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CA No. 19-11461-PBS
Pages 1 - 89

BEFORE THE HONORABLE PATTI B. SARIS
UNITED STATES DISTRICT JUDGE

United States District Court
1 Courthouse Way, Courtroom 19
Boston, Massachusetts 02210
July 15, 2022, 9:12 a.m.

LEE A. MARZILLI
OFFICIAL COURT REPORTER
United States District Court
1 Courthouse Way, Room 7200
Boston, MA 02210
leemarz@aol.com

1 A P P E A R A N C E S:

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3 Foley Hoag LLP, 155 Seaport Boulevard, Seaport World Trade
4 Center West, Boston, Massachusetts, 02210, for the Plaintiff.

5 JAMES M. GROSS, ESQ., Foley Hoag LLP,
6 1301 Avenue of the Americas, 35th Floor, New York, New York,
7 10019, for the Plaintiff.

8 ADEEL A. MANGI, ESQ., JONAH M. KNOBLER, ESQ. and
9 MICHAEL SOCHYNSKY, ESQ., Patterson, Belknap, Webb & Tyler LLP,
10 1133 Avenue of the Americas, New York, New York, 10036-6710,
11 for the Defendant, Appian Corporation.

12 DAVID MICHAEL MAGEE, ESQ. and KARL FISHER, ESQ.,
13 Armstrong Teasdale LLC, 800 Boylston Street, 30th Floor,
14 Boston, Massachusetts, 02199, for the Defendant Business
15 Process Management.

16 ALSO PRESENT: Christopher Geyer
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P R O C E E D I N G S

THE CLERK: Court calls Civil Action 19-11461, Pegasystems v. Appian Corporation, et al. Could counsel please identify themselves.

MR. HORVATH: Good morning, your Honor. For Plaintiff Pegasystems, August Horvath from the firm of Foley Hoag. With me are my colleagues Neil Austin and James Gross.

THE COURT: Thank you.

MR. MANGI: Good morning, your Honor. Adeel Mangi from Patterson Belnap Webb & Tyler for Appian. With me are my colleagues, Jonah Knobler, Michael Sochynsky, as well as our client, Christopher Geyer, who's right behind me.

MR. MAGEE: Good morning, your Honor. David Magee on behalf of Defendant Business Process Management. With me today is my associate, Karl Fisher.

THE COURT: All right. So have you all worked among -- you may be seated, please -- have you all worked out a schedule, or do you want me to put you on one? It sounds like --

MR. MANGI: By schedule, your Honor, I assume you mean a schedule for the process --

THE COURT: We have two hours. How long is your presentation likely from Pegasystems?

MR. AUSTIN: Well, your Honor, I think if we ran through from start to finish, it would be roughly 45 minutes,

1 maybe less.

2 THE COURT: And yours?

3 MR. MANGI: About an hour, your Honor, but we can
4 adjust to whatever time you have available.

5 THE COURT: And were you addressing all four motions
6 in your PowerPoint?

7 MR. MANGI: Yes, your Honor.

8 THE COURT: So I was thinking what might be more
9 helpful to me would be, for example, Appian's motion for
09:14 10 summary judgment on the claims, then your motion for summary
11 judgment on the counterclaims, and if there was time left over,
12 which there probably wouldn't be, address the motions to strike
13 experts.

14 MR. MANGI: That's fine, your Honor.

15 THE COURT: I don't know if you're -- I've just now
16 seen for the first time the PowerPoints, and I didn't know if
17 they broke down that way.

18 MR. MANGI: That actually fits my time sequence
19 perfectly.

09:14 20 MR. AUSTIN: Yeah, and it's not exactly fitting with
21 our proposed presentation, but that's fine, your Honor. We can
22 work around your preference.

23 THE COURT: Yes, just I'll be able to -- you also have
24 a motion for summary judgment on your own claim.

25 MR. AUSTIN: Correct, both affirmative and defensive.

1 THE COURT: So I don't mind if you address that at the
2 same time, but why don't we start with -- and is BPM going to
3 separately argue?

4 MR. MAGEE: Not unless necessary, your Honor.

5 THE COURT: Okay. So I'll just assume that, what I
6 thought would make the most sense, and I defer to you, would be
7 half an hour, half an hour on the -- is that too much time? --
8 on the...

9 MR. MANGI: On Appian's motion, your Honor?

09:15 10 THE COURT: Yes, your motion, a half an hour response.

11 MR. AUSTIN: That sounds about right, your Honor.

12 THE COURT: And maybe a little less, and to the extent
13 we have some left over, we can talk about the *Daubert* motions,
14 but --

15 MR. MANGI: I may borrow a little time from our other
16 motions, but that's basically fine.

17 THE COURT: Well, I'm not sure there will be time for
18 your two *Daubert* motions.

19 MR. MANGI: Right.

09:15 20 THE COURT: But you're welcome to leave it in. Some
21 of it overlaps actually.

22 MR. MANGI: Yes. Do you intend to reach their motions
23 for purposes of argument today, just in terms of whether I
24 should leave time?

25 THE COURT: Their motion for summary judgment?

1 MR. MANGI: Yes, his motion.

2 THE COURT: That's why a half an hour for your
3 presentation on your motion for summary judgment on their
4 claims, a half an hour on their claims for the BPM report. And
5 then we're going to move on to Pegasystems' motion for summary
6 judgment, for example, on the laches issue, et cetera, on your
7 claims, and whether things are advertisements, et cetera, and a
8 half an hour for them and a half an hour you can respond.

9 MR. MANGI: Understood.

09:16 10 THE COURT: And if you want to save a few minutes for
11 rebuttal, that's fine too.

12 MR. MANGI: Thank you.

13 THE COURT: The hard stop is, I have a sentencing at
14 11:00, so if there's stuff left over -- that will probably take
15 about a half hour -- you'd come back afterwards. I'd ideally
16 like not to have to make you do that. Okay, thank you.

17 MR. MANGI: Your Honor, would you prefer that I
18 address issues here or from the podium, or do you not have a
19 preference?

09:16 20 THE COURT: It's all about it doesn't matter to either
21 Ms. Marzilli, the Court Reporter, or me. You just need to
22 speak into the mic. And you're really tall, so sometimes the
23 mic doesn't catch you well.

24 MR. MANGI: Are you able to read me okay? Okay, I'll
25 make up for tallness with loudness, your Honor.

1 THE COURT: All right.

2 MR. MANGI: Okay, could we have control over the
3 system?

4 THE CLERK: You should. Let me toggle over to your
5 table. Just a minute.

6 THE COURT: I wouldn't mind borrowing a few of your
7 precious moments for argument for you to basically explain to
8 me what your product does.

9 MR. MANGI: Yes, your Honor, absolutely.

09:17 10 THE COURT: Because a lot of your debates about
11 whether something was truthful or not made no sense to me
12 without a tutorial on how the product worked.

13 MR. MANGI: Certainly. I'll start with that, your
14 Honor.

15 I note that our screen is not lit up, although the
16 others appear to be.

17 THE COURT: I don't know. She just left. If you
18 could grab...

19 I'm sorry, the screens aren't working.

09:18 20 THE CLERK: Whose aren't working?

21 MR. MANGI: Well, theirs just came on. Ours appear to
22 still be off.

23 THE CLERK: Just tap the front. It was on earlier,
24 correct?

25 THE COURT: Are we set now?

1 THE CLERK: Yes. We checked it this morning and it
2 worked, but there's always a glitch.

3 THE COURT: Yes. Okay, go ahead.

4 MR. MANGI: Your Honor, let me start with the
5 background you asked for on what the products do. So, your
6 Honor, these are competitors in a field called "business
7 process management," and the idea here is that when companies
8 have business functions and they wish to automate those and
9 have a way of working with them through a computerized process
09:19 10 flow, they can use these companies as vendors to help them do
11 that. So it could be something very small. Let's say you have
12 a company that has an employee on boarding process for new
13 hires, and they want to set up a way to do that such that
14 emails are automatically sent at certain stages, information is
15 pulled in from electronic databases at certain stages, but the
16 whole process is run through a business process that's set up
17 electronically. They can hire these companies to come in and
18 set up the technology to do that.

19 But sometimes it's much more involved than that. You
09:19 20 know, a company may wish to have a similar business process set
21 up electronically to run their whole business, from procurement
22 to manufacturing to shipping, have automated emails going out
23 at various stages of the process, manage it all through one
24 system, have data pulled in from different places. These
25 systems also allow them to do that. These are highly

1 customized products.

2 The companies offer their own consulting services or
3 they work with partners that help clients do that. In general,
4 these are sophisticated clients. They're some of the largest
5 companies in the country, as well as a number of small
6 companies, because the products run the gamut from things that
7 are very modest --

8 THE COURT: The consultants help design it, or they're
9 helping to run it?

09:20 10 MR. MANGI: There are consultants involved at all
11 stages of the process, some at procurement, some at design and
12 implementation, and then sometimes later at a client's
13 election, depending on the type of client and their own in-house
14 resources. So that in a nutshell is what they're doing, your
15 Honor.

16 THE COURT: And how many companies compete in this
17 market?

18 MR. MANGI: Many, many. In fact, I have a slide
19 showing you that.

09:20 20 THE COURT: All right, so I'll let you go. So say you
21 were a shoe manufacturer, this would help you with what,
22 everything from supply chain through sales?

23 MR. MANGI: Sure, yes. Where am I getting my leather
24 from? What's my manufacturing process? Which manufacturing
25 run are things on? When are they ready? Where are the orders

1 coming in? Where are we shipping them? Maybe we have an
2 automated email draft for a supplier when the inventory gets to
3 a certain level. Customer interactions can be automated, all
4 of that.

5 THE COURT: All right, so it's everything from, as I
6 read your papers, from banks to governments to just retail
7 merchants?

8 MR. MANGI: Yes, absolutely. If you look through both
9 companies' client lists, you'll recognize, you know, most of
09:21 10 the companies in the country, from the very large financial
11 institutions and banks and, you know, government agencies. For
12 example, Appian's clients include the U.S. Air Force. So it
13 runs the gamut, but this is a technology that is powering the
14 way many household brands and government agencies function
15 behind the scenes.

16 THE COURT: All right, so it's not the future; it's
17 the present. And all major companies have it?

18 MR. MANGI: It's very much the present.

19 THE COURT: So I'm not talking about little
09:22 20 mom-and-pop stores, but basically any major --

21 MR. MAGI: Little mom --

22 THE COURT: -- basically have these programs?

23 MR. MANGI: Little mom-and-pop stores can also use
24 this technology, your Honor. I'll give you an example. When
25 COVID hit, many state governments required businesses to have a

1 setup to track whether your employees have had a fever in the
2 last ten days or whether they had a positive test. Many
3 businesses used little COVID-specific apps. So every day
4 before coming in, you had to check off the right boxes. That's
5 an example of a product that these companies can supply, the
6 very simple small-end level.

7 THE COURT: All right, thank you.

8 MR. MANGI: Okay, that's a little bit of background.

9 Now, your Honor, let me touch, before I get directly
09:22 10 to our motion, on some crosscutting issues that I think will
11 apply both to our motion as well as to others.

12 Now, your Honor, as you know, Pega filed this lawsuit
13 almost three years ago now, in July of 2019. It wasn't the
14 first time they'd sued Appian. They had other lawsuits they
15 walked away from eventually, but they then chose to start this
16 one. And since then, as time has gone on, Pega has maintained
17 the suit, even though your Honor denied the preliminary
18 injunction motion, denied them expedited discovery to take that
19 further. BPM.com is not even in business anymore in this area,
09:23 20 but they've stuck with this and maintained it throughout.

21 But this lawsuit has, your Honor, turned out to be a
22 case study in unintended litigation consequences in ways that
23 are relevant in some ways to all of the motions you have in
24 front of you today. And let me give you just a quick overview
25 on some of those issues before I get specifically to our

1 motion.

2 Let me start, your Honor, by pointing out that once
3 this litigation started, we got into discovery from Pega, and
4 we discovered that they had been running some extraordinary
5 false advertising campaigns against Appian.

6 Now, this is just one example, your Honor. This is a
7 document I want to show you, and it's relevant to a number of
8 the motions here today because it goes ultimately to these
9 equitable issues that all sides are pointing to. And if I can
09:24 10 show you who these people are. So this is an email that
11 exchanges some texts between Matt Adams and Mark Ryan. Both of
12 these are senior executives at Pega. Mark Ryan is now they're
13 Managing Director of North American Financial Services dealing
14 with all those bank customers we talked about. Matt Adams is
15 now their Sales Director. And they're talking about the
16 advertising Pega has been running against Appian, and I want to
17 look at some of the things they say:

18 "We have been making stuff up for the past 2 years on
19 Appian." They recognize they don't have the best products.
09:25 20 They say, "Maybe one of the reasons that 90 percent of the
21 sales force isn't effective is that they are selling lies."
22 And then they say, "Actually, Sinur's document is somewhat
23 baseless based on our revelations." And they go on to
24 recognize what they're saying is "NOT true," capital N, and
25 they compare themselves to Woodward and Bernstein uncovering a

1 coverup.

2 So as things have developed, your Honor, we now have
3 counterclaims against them --

4 THE COURT: But aren't you -- I thought we were going
5 to deal with essentially their claims.

6 MR. MANGI: Yes, I'm about to get to their claims,
7 your Honor, but I just want to point out that when it comes to
8 these issues of equities that have come up all over, you know,
9 this is some piece of the background that I just wanted to flag
09:25 10 for your Honor, and I'll get to the rest of it in due course.

11 Now, let me turn specifically to our motion. Okay, so
12 our motion, your Honor, is focused on a very simple,
13 straightforward issue. Pega has all kinds of complaints about
14 the BPM.com report. They don't agree with those, but we set
15 all of those aside because our motion is focused singularly and
16 simply on one issue, the lack of injury to Pega.

17 Now, let me start with the legal grounding that we are
18 proceeding on. There is a debate about presumption, so I'll
19 get to that in a moment, but I will point out, the Supreme
09:26 20 Court in *Lexmark* pointed out that a plaintiff must show injury,
21 whether economic or reputational, flowing from the advertising.
22 And the Supreme Court there characterized that injury in terms
23 of causing customers to withhold trade from the plaintiff. And
24 while *Lexmark* did address that issue, it's not something new or
25 unique. You know, we cite some other cases on our Slide 11.

1 And let me note, your Honor, in particular the
2 *Verisign* case from the Fourth Circuit in 2017 because in some
3 ways, I think that's on all fours with what we have here. So
4 in *Verisign*, your Honor, Verisign was the exclusive seller of
5 dot-com domain names on the Internet, and they were suing XYZ,
6 which was a new, top-level domain that had been launched there,
7 XYZ. And there were false advertising claims as here. They
8 said XYZ was saying untrue things about the quality of dot-coms
9 available and about their own reputation and success in the
09:27 10 marketplace.

11 And the argument was then ultimately, is there any
12 injury here that is actionable? And the plaintiffs said, your
13 Honor, two things, the same things they say here: They say,
14 "Well, we've suffered a loss of goodwill because of this
15 advertising," and they had an expert. And the expert said,
16 "Oh, well, when I look at the business and the revenues before
17 the advertising and after the advertising, I see a difference,
18 so therefore that's injury." And the Court rejected both of
19 those things and granted summary judgment on the basis of no
09:28 20 injury because correlation and timing from the expert analysis
21 without showing causation doesn't meet the standard, and the
22 loss of goodwill needs to be particularized. And the Court
23 pointed out, of course, that this is a core requirement of the
24 statute.

25 So then, your Honor, knowing from our perspective this

1 BPM.com report that's at issue, it is in a dump, your Honor.
2 We put it out there. We didn't trace a dollar of business to
3 it. It had just been a failure from a marketing perspective.
4 In the litigation we focused very hard on, "Okay, in discovery,
5 we want to know how you say this injured you." And we went
6 after that through discovery in front of Judge Kelley, hard
7 from the beginning. And Pega gave us confirmation again and
8 again and again, and to Judge Kelley, that they could not
9 identify any lost business based upon this.

09:29 10 And I've given you a few examples here. In January of
11 2020 in front of Judge Kelley, she asked, "Do you believe
12 you've lost a customer?" And they said, "No, we've not
13 identified specific lost customers." In May of 2020, again
14 they asked, Mr. Horvath did, and confirmed no lost business, no
15 lost customers, no potential customers.

16 In July we had a hearing in front of Judge Kelley
17 again pressing the issue, and Judge Kelley asked them, "You're
18 not in possession of any documents showing your business was
19 diminished in any way?" And again they said, "No, we don't
09:29 20 know of anything to that effect." In fact, Judge Kelley
21 ordered them to, by October 22, identify to us any such lost
22 business because we were pressing it in discovery, and again
23 they wrote to us and said in Slide 15, "We haven't identified
24 anything there."

25 So then, your Honor, we went to their 30(b)(6)

1 witness's deposition. This was a witness who was identified
2 specifically to talk about the topic of injury to Pega from the
3 BPM.com report. When we asked him the open-ended question,
4 "Well, tell us, is there any specific customer you've lost?"
5 he said, "I don't know."

6 We went to other fact witnesses, same story. They had
7 a fact witness who was identified in their initial disclosures
8 on this very topic, injury from the BPM.com report. As you see
9 here, again he said, "Off the top of my head, no, I can't
09:30 10 identify any customers that we've lost."

11 They did give us, your Honor, emails that they had had
12 with three customers, but all of those customers, Ford,
13 Trackform, and Great West Casualty, an insurance company,
14 stayed with Pega. They never came to Appian. We never got any
15 business from them.

16 So when we pressed on that in discovery, ultimately we
17 got a stipulation from them, which is here on Slide 18. Their
18 business was not affected in any way with these customers.

19 So then, your Honor, after that whole sequence I just
09:31 20 showed you, they did eventually say, "Well, there's one.

21 There's one customer that we lost because of this, and that is
22 Oklahoma Gas & Electric." And this for context, your Honor, is
23 a company from which Appian got a total of \$196,000 in revenue
24 over three years. That's revenue, not profit. But what is
25 their claim based on as to OG&E? It is these ten words, your

1 Honor, that I've highlighted on the screen: an email from
2 Appian, within Appian, from a sales rep, Ryan Byrne, saying,
3 "The OG&E folks were really excited to hear about it,"
4 "it" being that there was this BPM.com report. And to be
5 clear, your Honor, that is it. That is all they have to ground
6 this claim of injury.

7 Now, they produced no communications with OG&E on
8 their side going to this. There is no evidence that OG&E ever
9 even read the BPM.com report, let alone that it had any
09:32 10 material impact in anything that they wanted to do or any
11 decisions that they ultimately made about any of this.

12 So that's it, that's what they're going on, and we
13 submit that's clearly not enough. They didn't, by the way, go
14 out to try and depose this Ryan Byrne who sent this email.
15 They didn't seek any discovery from Oklahoma Gas either, so
16 that is the sum total of it.

17 So then, your Honor, we went to that same 30(b)(6)
18 witness of theirs on injury, and he didn't bring up Oklahoma
19 Gas on his own when we asked, "How were you injured?" So then
09:33 20 we asked about this company specifically and said, "Well, what
21 about this company? What's your basis for saying you lost any
22 business from them?" And all he pointed to is, he said, "Well,
23 it's the timing and the lack of response." In other words,
24 "Right around the time you were using this BPM report, we
25 ceased to hear from this client."

1 And that, your Honor, is clearly not enough to
2 establish any kind of causal link, and we know that because
3 their own expert agrees. This is testimony from their expert,
4 Rebecca Kirk Fair, the economist, and we asked, "Does the fact
5 that they lost this opportunity in the same time frame that the
6 report was available provide a basis to conclude Pega lost it
7 because of the BPM.com report?" And she says, "No, I wouldn't
8 infer that, and I think it's improper to infer causation based
9 on that."

09:33 10 Now, given, your Honor, that they have no factual
11 evidence of any injury -- and let me point out, Judge Kelley
12 required them to specifically identify for us any basis for the
13 claim of injury -- OG&E is all they came up with. So given
14 that they don't have any factual basis, what they try to do to
15 plug that gap is to rely on experts. But experts, they can't
16 invent injury out of thin air, and here you see Kirk Fair says
17 exactly this, which is, you know, you can't just infer it from
18 temporal proximity. But then she goes ahead and tries to do
19 exactly that.

09:34 20 So the methodology that she ultimately implemented --
21 and my colleagues, your Honor, will address the *Daubert*
22 issues --

23 THE COURT: Well, if we have time.

24 MR. MANGI: Yes, yes, but I'll touch on the key issue
25 here, which is she says, "Look, I looked at the business in the

1 time period before the advertising and the time period after
2 the advertising, and so I see there's a difference. Appian's
3 rate of acquiring new customers went up," so Appian has no
4 injury, right?

5 Now, that's clearly not good enough because your Honor
6 will recall the *Verisign* case I pointed to. The court there
7 said the fatal flaw in Lanham Act cases is where experts or
8 parties try to infer causation from correlation. This is
9 exactly that same fatal flaw here, the same thing she said was
09:35 10 inappropriate. And in fact we pressed the issue. So we said
11 to her, "Okay, so you're saying some of these new customers are
12 because of the BPM.com report? How many?" And her testimony
13 was, "Well, it's more than zero percent, less than a hundred
14 percent."

15 So that's completely meaningless. She was just
16 guessing based on the fact that they're new customers, and we
17 know that because when we pressed the issues further, here's
18 what she said, your Honor. Let alone say this was caused by
19 the BPM.com report, which is the proximate causation injury
09:35 20 requirement in *Lexmark* and others, she says, "I was not even
21 asked to identify a causal relationship between the BPM.com
22 report and any of these contracts." She didn't even try. She
23 admits that many of these incremental customers may never even
24 have seen the BPM.com report. She says they weren't exposed;
25 they're not even injured.

1 THE COURT: The BPM report was on the website, right?

2 MR. MANGI: It was on the website, your Honor, for a
3 period of time, and then we took it down.

4 THE COURT: For what period was it on the website?

5 MR. MANGI: So it was on our website, it went up in
6 May of 2019, and we took it down in January of 2020, a period
7 of about eight months.

8 THE COURT: And are the companies she talks about ones
9 that signed on during that period?

09:36 10 MR. MANGI: She is looking at the time period 2019 and
11 on into 2020.

12 THE COURT: So not exactly cabined by those dates?

13 MR. MANGI: I think that's right, yes. She's looking
14 at splits. But, in any event, were they concerning Pega? No,
15 doesn't have any basis to say that. And in fact we asked her,
16 "Is it possible some of these had nothing to do with the
17 BPM.com report?" She agrees with that, doesn't dispute it.

18 Now, your Honor, your *HipSaver* case, you mentioned
19 this case at our motion to dismiss hearing, and I wanted to
09:37 20 just point out there in red, your Honor also dealt with this
21 exact same issue which the *Verisign* court did too. You pointed
22 out that without an expert opinion, the growth rate
23 differential was a result of the false ads. You know, growth
24 rates alone can't support causation.

25 And your Honor pointed out various other factors that

1 can play into differential growth rates, and we've got very
2 much the same ones here, your Honor: different advertising,
3 different strategies. In fact, the thing we talked about in
4 the morning when I started about some of these small customers
5 with COVID-related apps, that was in play here too. So there
6 is no evidence ultimately of any causation, only of correlation
7 at best.

8 THE COURT: Economic harm?

9 MR. MANGI: Absolutely, an actionable injury.

09:38 10 THE COURT: How do I think about reputational harm?

11 MR. MANGI: So I have a few slides on that.

12 THE COURT: Okay, go for it.

13 MR. MANGI: Okay. Well, let me just round out on this
14 topic, and then we're actually going straight to that, which
15 is --

16 THE COURT: Yes, they're not seeking lost profits.

17 MR. MANGI: Yeah, they're not even seeking it, so
18 we're not arguing.

19 They have another expert, Dr. Pearlson, and this is a
09:38 20 cyber-security expert, and she comes and just provides a
21 conclusory one paragraph where she says, "Oh, you know, I think
22 there is injury here too." But she's got nothing to do with
23 this industry. She has done no quantification. She's just
24 opining, and she says, "I don't know anything about BPM. I'm
25 not an expert in this --"

1 THE COURT: Can I just --

2 MR. MANGI: Yes.

3 THE COURT: I understand your point on economic injury,
4 but on reputational injury --

5 MR. MANGI: Yes.

6 THE COURT: And I go there because isn't it common
7 sense that when you have two prime competitors battling it out,
8 that if you're going to say one is eleven times more expensive
9 than the other one, that that is going to hurt them

09:39 10 reputationally? I mean, do you need an expert to think that?

11 MR, MANGI: Well, yeah, let me address that, your
12 Honor.

13 THE COURT: I mean, is that a reasonable inference?
14 Apart from presumptions, apart from experts, you're duking it
15 out for many customers, and you say, "Well, not only is it
16 eleven times more expensive, but it's longer to get to market
17 than we are."

18 MR. MANGI: Yes.

19 THE COURT: "We're more nimble," I guess the effective
09:39 20 point is.

21 MR. MANGI: Right, yeah. Our -- please.

22 THE COURT: So I don't know what reputational harm
23 gives you, but that was the point of the BPM, was to beat them
24 out in the marketplace.

25 MR. MANGI: Yes, I understand your point entirely,

1 your Honor. Let me address it. So reputational harm is a
2 nebulous concept, and certainly many plaintiffs, anytime
3 there's advertising, can come in and say, "Well, you know, you
4 talked about us. Therefore by inference it's harmed our
5 reputation, so we get to go ahead." And so therefore courts
6 and the Supreme Court have been careful to say: Reputational
7 harm, sure, that is a thing, but if you're going to get past
8 summary judgment, especially when you're pursuing a monetary
9 claim, you have to show that that injured you in the form of
09:40 10 lost business. And that is a direct quote from *Lexmark* that I
11 put up on the earlier slide. Loss of trade is a measure, that
12 we're talking both about reputational injury and economic
13 injury.

14 THE COURT: They're not seeking damages. They're
15 seeking disgorgement.

16 MR. MANGI: It doesn't matter, your Honor.

17 THE COURT: Do you have a case that discusses that
18 specifically --

19 MR. MANGI: Yes.

09:40 20 THE COURT: -- when you do not have lost profits,
21 which they concede?

22 MR. MANGI: Yes.

23 THE COURT: And not *Lexmark*. That was more general.
24 Just something where there was reputational harm but no lost
25 profits, what do you get?

1 MR. MANGI: Yes, I'll give you some examples, your
2 Honor. So, first of all, I will say, you know, *Lexmark* itself
3 stated categorically, talking about reputational injury, you
4 need to show lost business. We cite cases in our papers --

5 THE COURT: Can you give me the exact quote because
6 I'm not sure I saw that.

7 MR. MANGI: Yes.

8 THE COURT: You keep emphasizing the word "evidence"
9 from that case, but I think they weren't excluding reasonable
09:41 10 inferences, that if you have a head-on-head attack and it's
11 false, willfully false, that there's an inference there's
12 reputational harm.

13 MR. MANGI: Yeah, so let me take us back to Slide 11.
14 Here we go. Okay, so that's what they were talking about, your
15 Honor, economic or reputational injury flowing from the
16 advertising. And then how do you show that? You need to show
17 that it caused customers to withhold trade from the plaintiff.

18 THE COURT: So you're saying *Lexmark* was intended to
19 eliminate the theory of disgorgement of profits?

09:42 20 MR. MANGI: No, your Honor. You can pursue
21 disgorgement, but even to pursue disgorgement, you need to show
22 that you were injured in some concrete way in terms of loss of
23 business. And in fact we do cite a case of *Gravelle v. KABA*
24 from the Federal Circuit 2017 that goes to specifically that
25 point and says that under *Lexmark*, you still need to show

1 injury in the form *Lexmark* prescribed, even for a disgorgement
2 claim.

3 THE COURT: But was it economic injury or reputational
4 injury in that Fifth Circuit case?

5 MR. MANGI: The *Gravelle* case? I'll have to check
6 that one, your Honor. But the point there is disgorgement,
7 right? Even in disgorgement, you've gotta show --

8 THE COURT: But reputational injuries -- I'm not sort
9 of playing in the gray area of this case -- for reputational
09:42 10 injury, do you have to show actual business injury because then
11 doesn't that conflate the two notions?

12 MR. MANGI: Well, I would suggest, your Honor, that --
13 yeah, so we also cite, your Honor, at Page 23 of our summary
14 judgment papers the *Scholz* case, and this is a quote: "At the
15 summary judgment stage, a plaintiff," quote, 'needs to point to
16 actual evidence of reputational injury.'" And what the cases
17 do also point out, your Honor, is that a subjective belief is
18 not enough, and so --

19 THE COURT: But here what we've got is three companies
09:43 20 who made inquiries, right?

21 MR. MANGI: Right.

22 THE COURT: And you have an expert in the field
23 saying, in my view, somewhat the obvious -- it wasn't that it
24 was outside her expertise -- is that if you have an attack
25 head-on-head on a competition, competitive situation, it's

1 likely to cause injury.

2 MR. MANGI: Your Honor, I'll cite to you another case
3 exactly with the parallel here, *Pandora Jewelry v. Chamilia*
4 from the District of Maryland in 2008, also cited in our
5 papers, a summary judgment case where the same thing had
6 happened in terms of three customers had wrote in and said, you
7 know, "What about these claims that are being put out there?"
8 You know, "Doesn't this harm us?" And the court said, "That's
9 not enough. You've got to show that there's actual injury
09:44 10 beyond that."

11 There can be no generalized inference, I would
12 suggest, your Honor. There's no basis for drawing a
13 generalized inference to that effect, especially -- and this is
14 most pronounced --

15 THE COURT: I don't view it generalized. I think of
16 it in terms of reasonable inferences; you know, just like
17 you're ticked off about the Sinur paper. You know, reasonable
18 inferences, the two of you have been fighting for seven years
19 or so, and you're attacking each other; you're trying to attack
09:44 20 each other's reputation.

21 MR. MANGI: Yeah. Well, let me show you some of the
22 specifics on that reputational issue, your Honor, so you can
23 get a sense of what's happening here. So, you know, this is
24 one of the emails that they sent on which they're grounding
25 this reputational claim. This is from Great West Insurance

1 Company, and they are saying, you know, "We came across this
2 report. We're interested in hearing Pega's comments on it,"
3 all right. So this is one of the bases they have for that
4 claim.

5 If you look at the next slide, this is how they
6 responded to it. And this, your Honor, is part of our more
7 general point that everything about this report and its
8 methodology is fully disclosed. We know that because Pega was
9 able to address all of the issues they complain about now at
09:45 10 the time responding to this company. They talked about the
11 number of respondents and how Pega respondents were a small
12 percentage, so their numbers could be swayed by one, how many
13 are an insurance, how many and so on. So they're addressing
14 all of their reputational issues directly.

15 And then what happened? Subsequently they say
16 themselves, "Look, the report has been out for five months.
17 We're not even seeing downloads of our planned report to it.
18 There is no activity that we're seeing out here in the market
19 from it." And in fact, when we asked the 30(b)(6) witness,
09:46 20 "What is the reputational injury that you're suffering, and
21 where did you have to invest money to repair these
22 relationships?" he couldn't point to any. He had no evidence
23 of any actual dollar spending.

24 And, your Honor, this I think is the most, perhaps the
25 strongest factual point on reputational injury, which is if

1 this was really injuring their reputation, you would think the
2 last thing Pega would want to do is encourage people to read
3 it, but that's exactly what they were doing. So this is an
4 email from their chief financial officer and chief operating
5 officer, Ken Stillwell, and he's referring to a hearing before
6 your Honor where your Honor had asked me at the motion to
7 dismiss stage that, did we commission the report? And we said,
8 yes, we did, the BPM report. And he's telling them, look,
9 under questioning from the Judge, they conceded a devastating
09:47 10 fact, that they commissioned the report, and go out and used
11 this in the marketplace. So if anything, your Honor, they
12 thought that this whole story helped them from reputational --

13 THE COURT: You can't do that on summary judgment.
14 But the narrow legal point you're making, because you're out of
15 time basically, if you want to wrap up, the narrow legal point
16 is that there are no economic damages, and your view is
17 legally, the question of law is, perhaps there was reputational
18 injury, but there was no showing that it caused economic harm.
19 And that's not enough to just have reputational injury without
09:47 20 economic injury; is that right?

21 MR. MANGI: Yes, in the circumstances of this case,
22 your Honor, where there's now no live injunctive claim because
23 we have comprehensively mooted that, this is about monetary
24 relief. And they cannot proceed in the abstract on a claim of
25 reputational harm without showing that some actual injury

1 resulted from that, economic injury. Whether, you know, it be
2 a lost customer, or perhaps even they could pursue something
3 like, you know, "We had to spend these \$10,000, \$100,000 on
4 this project or that project because of this." There has to be
5 some economic linkage for a monetary damages claim before you
6 can proceed. Just saying it was about us, that's not enough,
7 because what that would mean, your Honor, is essentially
8 they're applying a presumption, but in this case in particular,
9 where it's not a two-player market, unlike in your *HipSaver*
09:48 10 case and others.

11 And, you know, let me say also, if there were any
12 presumption here, which we don't think there is and we don't
13 think it survives *Lexmark*, it's comprehensively rebutted, and
14 the bubble is burst in terms of the language of the case law
15 because we've shown there is no basis for any claim.

16 THE COURT: All right, I think you need to wrap it up.

17 MR. MANGI: And I'll point out in my last point, your
18 Honor, that if anything, you know, their sales in this time
19 period -- and *HipSaver*, your Honor, pointed out one of the
09:49 20 things you look to is lost customers, or were their sales
21 impacted? -- their sales went up. In fact, after we started
22 this advertising, they went up even more sharply than they ever
23 had before. And this is a chalk where you can see that. 2019
24 is where we started this advertising, and you can see their
25 sales skyrocketed. There's no actionable evidence of any

1 injury.

2 THE COURT: Thank you.

3 MR. AUSTIN: Good morning, your Honor.

4 THE COURT: Good morning.

5 MR. AUSTIN: Thank you, your Honor. Neil Austin for
6 Pegasystems. And if I may, I'd like to actually start with
7 some undisputed facts just to set the stage here. And so while
8 we are waiting for those, let me just say that the gist of
9 Appian's argument is that Pega has failed to come forward with
09:49 10 evidence that it suffered any injury, and that's just wrong on
11 a number of fronts, and -- do we have this up?

12 THE CLERK: Hold on.

13 MR. AUSTIN: And, your Honor, I want to start with
14 some undisputed facts because I think they really set the
15 stage, both in terms of what the intent of the defendants were,
16 which I think is certainly relevant to the presumption, but,
17 frankly, relevant even in the absence of any presumption; and
18 what the evidence shows is that the defendants made literally
19 false statements about Pega that appeared as unbiased,
09:50 20 verified, and objective, and which were very difficult to
21 debunk. And if you look at the BPM.com report itself, it's
22 presented almost as a scientifically valid survey. It uses
23 words like "verified" and "validated," and it references
24 information in ways that would lead one to believe that it's
25 objective and unbiased. But if we look at actually how the

1 report was generated, it's very telling, your Honor.

2 And so we'll start with the contract itself between
3 BPM.com and Appian, and what it says is that "BPM.com will
4 develop an authoritative, evidence-based white paper targeting
5 an audience of evaluators and economic buyers of BPM and
6 digital business platforms." And here's the really important
7 part: "This white paper will clearly identify and articulate
8 the value delta of Appian over Pega through the specific data
9 points and metrics captured with the market research performed
09:51 10 with this project." In other words, your Honor, BPM.com
11 obligated itself contractually to create a report that would
12 show that Appian was superior in terms of value and other
13 metrics.

14 And if we go to the next slide, we'll see that the way
15 they did this in practice was evident in the internal emails.
16 We see an internal email here from Cat Pang Aniban dated
17 October of 2018. She's one of the individuals who was really
18 critical in generating the BPM.com report. She wrote
19 internally to Appian -- not externally, of course -- that "We
09:52 20 have an opportunity to influence the outcome by allowing some
21 of our happy customers to participate."

22 So, again, clearly, your Honor, the fix was in; the
23 thumb was on the scale. But it actually didn't stop there
24 because her boss later that same day said, "Happy is not
25 enough. We need to get customers that have a low TCO profile,"

1 which, by the way, is one of the metrics in the paper and the
2 report, "which means they pay significantly lower than our
3 average customer per user/per month."

4 And let's just pause there. They're looking for
5 Appian customers --

6 THE COURT: You know, I know you've stated a claim
7 with respect to the report. The issue is whether you had
8 injury flowing from it.

9 MR. AUSTIN: So I'll get to that, your Honor. I'm
09:52 10 only walking through this because I think it's relevant to the
11 issue of intent, but let me address your Honor's question more
12 directly because in fact there is evidence of actual harm here.
13 There are the three customers who we referenced before. You
14 know, one of the customers said that if this report is remotely
15 accurate, it is very concerning, as you might imagine. This
16 shows the customers read the report, they took the claims
17 seriously, and that they were concerned about the implication.

18 But, of course, not every customer or potential
19 customer, and especially not every potential customer who sees
09:53 20 this, is going to reach out to Pegasystems for an explanation.
21 This is the kind of paper that really poisons the well in terms
22 of getting new business because you're just not going to get in
23 the door if a potential client thinks that you're eleven times
24 more expensive than your competitor. So we think that those
25 three customers are relevant, whether or not they show economic

1 damage, because they demonstrate that there is this reputational
2 harm, this reputational impact.

3 There is also the evidence that Pegasystems lost a
4 customer, OG&E. I think in the context of a summary
5 judgment -- I can see the expression on your face, your Honor,
6 but --

7 THE COURT: I have been thinking a lot about that.
8 It's an internal email within Appian interpreting the feelings
9 of someone from OG&E that they were excited to get it. So we
09:54 10 can say they got it. We have no way of knowing what weight
11 they put on it and -- and the fact they got the contract. I
12 don't know if you can support a reasonable inference from that
13 that --

14 MR. AUSTIN: Well, the other piece of it, your
15 Honor -- I'm sorry.

16 THE COURT: -- that the report caused the loss of
17 profits.

18 MR. AUSTIN: Well, I think the other piece of it, your
19 Honor, and I hear your point, but I think the other piece is
09:54 20 that we will have testimony at trial that, from the Pega side
21 of the equation, things were going very well with OG&E, and
22 suddenly --

23 THE COURT: I don't have any of that in the record, do
24 I? I don't have a deposition from OG&E. I don't have your
25 salesperson who dealt with them. It's just pretty -- it's

1 something. It's something. Is it enough to get over that a
2 reasonable fact-finder could find they lost it due to this? I
3 don't know. It's pretty thin.

4 MR. AUSTIN: There's testimony, your Honor, from the
5 corporate representative, Don Schuerman, which is captured in
6 our statement of fact. But in addition to that, obviously, as
7 your Honor knows, the evidence is construed in the light most
8 favorable to Pega for purposes of summary judgment.

9 THE COURT: Why didn't you take his deposition?

09:55 10 MR. AUSTIN: Your Honor, there's a concern, frankly,
11 with our client, perhaps with both clients, that by dragging
12 customers and clients into this --

13 THE COURT: You lost it, though, so --

14 MR. AUSTIN: Well, you never know when you can win a
15 customer back, your Honor.

16 THE COURT: It's a "maybe."

17 MR. AUSTIN: Pardon me?

18 THE COURT: It's a "maybe."

19 MR. AUSTIN: Understood.

09:56 20 THE COURT: I mean, I wouldn't want to rest my whole
21 case on what a fact-finder would find based on that one
22 internal Appian email.

23 MR. AUSTIN: Because the flip side of the coin, your
24 Honor, is that Appian's own internal documents also show that
25 the BPM.com report was influencing prospects. For example,

1 there's an internal Appian email that shows that a program
2 manager at a potential customer, GE Healthcare, noted that the
3 information in the BPM.com report was highly valuable; and he
4 showed it to a colleague, and she's about ready to jump on
5 board the train. So that's another piece of evidence. That's,
6 again, from Appian's own internal records. And even another
7 that --

8 THE COURT: So why aren't you claiming these places --
9 I'm having trouble with your damage theory or disgorgement
09:56 10 theory. Why aren't you claiming these as lost profits?

11 MR. AUSTIN: Well, in the case of GE Healthcare, your
12 Honor, I don't think the evidence is clear that Pega was in
13 competition for that. But, frankly, the issue is one of, we
14 don't know all the customers and all the potential damage, so
15 focusing on lost profits is, frankly, a very narrow approach;
16 whereas, we can look at what happened behind the scenes at
17 BPM.com and Appian. We see the intentionality that went into
18 creating a false report.

19 THE COURT: Let's assume I'm with you on this, there's
09:57 20 some evidence of reputational injury, the experts says zero to
21 a hundred percent, how does one even begin to -- zero to one
22 hundred percent, I couldn't send it to a jury, right, I mean,
23 at zero to a hundred percent? You'd be reversed in a
24 nanosecond for speculation. Sometimes disgorgement is
25 equitable. Is that me? I mean, is that the case in a Lanham

1 Act case? I don't know that it's jury or --

2 MR. AUSTIN: It's equitable, your Honor.

3 THE COURT: It's equitable. I'm just having trouble
4 with your disgorgement theory if you're not looking for lost
5 profits and you don't think you have enough evidence to even
6 get lost profits, and you're asking me to disgorge all their
7 profits for companies that you can't say you would have won?

8 That may be jumping the gun, but it's fundamentally, if you're
9 not in the economic injury mode, and you're right that

09:58 10 reputational injury is part of it, really? You want me to make
11 a disgorgement finding based on a zero to one hundred percent
12 range?

13 MR. AUSTIN: Well, your Honor, what I would say to
14 that is that -- and this sort of bleeds over into the *Daubert*
15 issues as well -- but Ms. Kirk Fair, in calculating potential
16 damages scenarios, she tied it to specific advertising. So she
17 took a look at the incremental growth rate, which accelerated
18 after the BPM.com report, and within that roughly \$30 million,
19 she focused on amounts that were at issue with competitive
09:58 20 opportunities between Pegasystems and Appian. And even within
21 that, she looked at instances of competitive opportunities
22 where there's known exposure to the BPM.com report. So there's
23 a tie-in to the --

24 THE COURT: That's unlikely, right, to be supported,
25 just to say you get all of the growth factor? I know there's

1 an alternative theory, but I'm just trying to figure out where
2 this is going. If all you've got is reputational injury, sure,
3 they tried to hurt your reputation, sure, it's on their website
4 for six months or so; but there is no lost profits because you
5 were pretty aggressive and on the mark, I remember, in getting
6 a preliminary injunction, and then they withdrew it, et cetera.
7 I'm just trying to understand, even if I say there's reputational
8 injury, where does that get you?

9 MR. AUSTIN: Well, again, your Honor, I think the
09:59 10 critical piece here is that the nature of this report is that
11 it is, again, unbiased, objective apparently. And so customers
12 or potential customers seeing this or receiving this, they're
13 never going to come to Pegasystems as a potential vendor
14 because they're going to understand that we're eleven times
15 more expensive. It's very difficult to prove that, and in fact
16 I would say it's impossible to prove the customers that you
17 lost that you didn't know about.

18 THE COURT: For a hundred percent of all their
19 business in the six-month period, is that essentially your
10:00 20 theory?

21 MR. AUSTIN: Well, the theory is that some portion of
22 that certainly should be --

23 THE COURT: How would I know?

24 MR. AUSTIN: Well, the jury would hear the evidence
25 and make --

1 THE COURT: I thought it was me, you said, if it was
2 equitable.

3 MR. AUSTIN: Well, your Honor would hear the evidence
4 and make a determination.

5 THE COURT: I'm jumping the gun a little bit, but even
6 if I find your way and then when all reasonable inferences are
7 drawn in favor of you that there's reputational injury, I'm not
8 sure what I do with it if there's no showing of economic harm.
9 You hear what I'm saying? I don't know what other cases like
10:01 10 this have done with it.

11 MR. AUSTIN: Well, your Honor, right, and so on the
12 issue of the cases, if your Honor would like for us to brief
13 that --

14 THE COURT: No more briefing.

15 (Laughter.)

16 MR. AUSTIN: Okay, understood.

17 THE COURT: In fact, I have a standing order: No one
18 gets above the local rule page limit anymore. That was an
19 insane amount of briefing. I couldn't even carry most of it in
10:01 20 here. The poor law clerk, I felt like I was burying him alive.
21 It's too much. Look at all the lawyers you have. I have one
22 law clerk. So, please, no more briefing. You can do notice of
23 supplemental authority, that's fine, if something comes in, but
24 no more briefing.

25 MR. AUSTIN: And the other point I'd make, your know,

1 is that there's still a live claim for a permanent injunction,
2 obviously which doesn't turn on damages at all.

3 THE COURT: Is this case all about that?

4 MR. AUSTIN: Well, no. It's --

5 THE COURT: They've withdrawn it. And maybe it's
6 moot, maybe it's not. There's case law on both sides on that
7 depending on whether there's a likelihood of having them redo,
8 republish it. They say that there's not. It basically sounds
9 like a dead letter right now.

10:02 10 MR. AUSTIN: Well, they do say that, your Honor, but I
11 think the law is pretty clear, the voluntary cessation
12 doctrine, that -- and, in addition, we asked for more than --

13 THE COURT: You might get attorneys' fees to that
14 point, but my point is only, I'm hoping the suit isn't just
15 about whether or not I issue a permanent injunction.

16 MR. AUSTIN: No, it's not, your Honor. We do think
17 we're entitled to disgorgement, whether having shown actual
18 harm or whether under the presumption of harm from the *HipSaver*
19 case.

10:02 20 THE COURT: Because would you agree they've rebutted
21 the presumption of harm, which I do think is viable case law,
22 but do you think they've rebutted it by showing there are no
23 lost profits?

24 MR. AUSTIN: I don't, your Honor, again because the
25 issue and the challenge for this document is that it's very

1 difficult to rebut, to debunk because, again, someone who's
2 reading this is looking at it as an objective, unbiased,
3 quantitative, data-driven report, and so they take it at face
4 value. And, again, it poisons the well. It's going to be the
5 type of report that makes it very difficult, if not impossible,
6 for Pega to reach customers who have seen it and who were
7 impacted by it.

8 THE COURT: Don't you assume everybody has seen it,
9 even the ones who go to you?

10:03 10 MR. AUSTIN: I don't think -- well, I wouldn't assume
11 that. There's no evidence of that.

12 THE COURT: For that short period of time.

13 MR. AUSTIN: Well, there's no evidence to that in the
14 record, your Honor, and I --

15 THE COURT: I mean, it's on the website, right?

16 MR. AUSTIN: It was on the website for some time.

17 THE COURT: Do you consider them your prime
18 competitor?

19 MR. AUSTIN: They are a significant competitor. I
10:03 20 don't know that we would consider them our prime competitor.

21 THE COURT: Who are the other competitors?

22 MR. AUSTIN: There are many others, your Honor; IBM,
23 for example, Salesforce.com. There are others. They're
24 certainly a significant competitor.

25 THE COURT: Is there a breakdown in the market of how

1 many, you know, what Salesforce has or --

2 MR. AUSTIN: There is, your Honor. It's not in the
3 record, frankly.

4 THE COURT: Okay, but they're all major competitors?

5 MR. AUSTIN: Well, whether we would consider them
6 major competitors or not, I'm not sure, but they are
7 competitors.

8 THE COURT: Are you the leader in the field?

9 MR. AUSTIN: Absolutely.

10:04 10 THE COURT: So that's -- yes, anyway.

11 MR. AUSTIN: Without question, your Honor.

12 THE COURT: I'm sure your client is sitting there,
13 right?

14 (Laughter.)

15 THE COURT: I've heard of, obviously, IBM. I've heard
16 of Salesforce. What was the other one you mentioned?

17 MR. AUSTIN: I think those are the only two I mentioned.

18 THE COURT: Oh, are they? All right, all right.

19 MR. AUSTIN: But again, your Honor, that's the point I
10:04 20 would stress. The reason we're seeking monetary disgorgement
21 here is because the very nature of this report, it can't be
22 rebutted. The total cost of ownership is -- frankly, it's
23 difficult to find out that information even from your own
24 customers, but certainly we don't have information about
25 Appian's customers' total cost of ownership. So it's out

1 there. It's poisoning the well. It's making it very difficult
2 for us to increase our new business, and that's a fact. It's
3 difficult to prove, I take that, but I think the Lanham Act
4 cases understand and recognize that. And that's, frankly, one
5 of the reasons we have disgorgement as a penalty here, and I
6 think it's appropriate, particularly when you look at some of
7 the really egregious conduct that took place in the creation
8 and, frankly, dissemination of the report.

9 THE COURT: Well, in the alternative theory of the 29
10:05 10 where you had head-to-head competition?

11 MR. AUSTIN: Pardon me?

12 THE COURT: There was an alternative theory, which is
13 not looking at every increase in revenue, which seems out of
14 line, but specific companies that went to Appian over
15 Pegasystems during a time period.

16 MR. AUSTIN: That's exactly right, your Honor, and
17 maybe --

18 THE COURT: Wasn't that her alternative theory, the
19 expert's alternative theory?

10:05 20 MR. AUSTIN: Well, I wouldn't call it an alternative
21 theory. There were a number of different ways of calculating
22 the potential scope of damage. One looked at just the gross
23 increase in growth rate, so that was roughly \$29 million, if I
24 recall correctly. Of that number, the expert did two other
25 calculations, one that looked at the incremental growth rate

1 where there was actually competition for new clients between
2 Pega and Appian. That number was roughly \$19 million, if I
3 recall.

4 THE COURT: And of the ones that went to Appian
5 instead of Pega?

6 MR. AUSTIN: Correct, correct.

7 THE COURT: In that time period?

8 MR. AUSTIN: In that time period. And even drilling
9 down further, there was yet a third cut of the damages model
10:06 10 that looked at, there had to be competition between Appian and
11 Pega, it had to be an Appian win, and it had to be a situation
12 where we know that the customer received the BPM.com report.

13 THE COURT: And how much was that?

14 MR. AUSTIN: \$13 million. And so, your Honor, that's
15 the point I'd like to stress because, you know, the case law
16 really does seem to make a distinction between proof of
17 causation and injury on the one hand -- and that's where the
18 presumption comes in -- but then there's a second line in the
19 case law which says that the actual measure of damages has to
10:06 20 have some connection to the false advertising. And I would
21 submit that that clearly does, your Honor, whether it's the
22 \$19 million figure that's based on the head-to-head
23 competition, or whether it's the \$13 million figure that's
24 based on a combination of head-to-head competition and
25 knowledge that the BPM.com report was actually distributed to

1 those customers.

2 THE COURT: Thank you.

3 MR. AUSTIN: You're welcome. So I think, your Honor,
4 if I've addressed your questions, we'll reserve any extra time
5 we have for additional argument.

6 THE COURT: Yes.

7 MR. MANGI: May I rebut, your Honor?

8 THE COURT: Ten minutes, but you're over the time, so
9 you're going into the other one.

10:07 10 MR. MANGI: I'll shorten my later argument.

11 So, your Honor, I'll just deal with a few quick points
12 here. First, the question your Honor asked, how have other
13 courts dealt with this issue on reputational injury? Obviously
14 we don't concede there was any injury, even reputational, but
15 set that aside for a moment.

16 So let me refer your Honor to a supplemental authority
17 that we submitted earlier this week that I think is exactly on
18 point. It's a case from June 28, just a few days ago, from the
19 Western District of Washington. The case is *Universal Life*
10:08 20 *Church Monastery Storehouse v. American Marriage Ministries*,
21 and I think this goes exactly, your Honor, to the issue you're
22 concerned about.

23 So the parties in this case, your Honor, are companies
24 that offer online ordination services, so they qualify people
25 to perform marriages. I suppose in some ways they're competing

1 with your Honor, among other things, but --

2 THE COURT: Do you know the judges in Massachusetts
3 refused to get the right to marry people because they didn't
4 want every weekend taken up?

5 (Laughter.)

6 THE COURT: It deliberately withdrew from that market.

7 MR. MANGI: Well, your Honor, then you won't have
8 standing. But, nonetheless, they sued each other. And, your
9 Honor, talk about, you know, reputational injury; some of the
10:08 10 allegations here were by one against the other, where they'd
11 been in and out of courtrooms, they've had their not-for-profit
12 status revoked, they've been embroiled in fraud allegations,
13 so, you know, really going after the reputation in very direct
14 and uncontroversial ways. So that's what was going on there.

15 And the parties came in, and the argument again was,
16 the plaintiff was saying, "Well, look, you know, with all of
17 these types of claims out there, you have to assume that we
18 were injured, that there was, you know, reputational injury."
19 And in fact they said, "We should have a presumption of
10:09 20 reputational injury and presumption of injury." And the other
21 side came in and said, "Well, you know, after *Lexmark*, there
22 can't be any presumption because *Lexmark* says clearly you need
23 to have evidence of an injury."

24 And interestingly enough, your Honor, the Western
25 District of Washington, they disagreed with the notion that

1 *Lexmark* has done away with presumptions altogether, and so they
2 disagreed even with the position that we argue, which is that
3 *Lexmark* has done away with it altogether. But what the court
4 said is -- and they were relying on Ninth Circuit law, your
5 Honor, and they were focusing on the issue of in a two-player
6 market, which are all things that are absent here, but
7 nonetheless they said, well, you know, what we find is, under
8 Ninth Circuit precedent in this two-player market, for purposes
9 of an injunctive relief claim, you know, they say reputational
10:10 10 challenge, but that's enough; and that's enough because, you
11 know, this could do harm in the future as well because clearly
12 it's a full frontal attack on the other side's reputation and
13 veracity and so on.

14 But the Court then made a distinction and said, but at
15 summary judgment, when we're talking about monetary relief,
16 there it's different. And the court said, for monetary
17 relief --

18 THE COURT: What page are we on?

19 MR. MANGI: So, your Honor, this is now at page *15.

10:10 20 THE COURT: Okay, I'm going there.

21 MR. MANGI: And if you look at the bottom of the
22 second column, there's a WCPA claim section, and right above
23 that, the paragraph right above that starting with "here" about
24 ten or twelve lines up, the Court says, "Here, ULC Monastery
25 has not directed the Court to any evidence that would support

1 an award of monetary relief on its Lanham Act claim, nor has it
2 cited any case that awarded monetary damages to a plaintiff
3 based only on the presumption of commercial injury." And you
4 will see at the top of that paragraph is where the Court says
5 the same is not true on monetary relief, and before that,
6 they're talking about injunctive relief. So that, your Honor,
7 I would submit is very much the issue here.

8 Also, just so your clerks have it, on Page 23 of our
9 moving brief at Footnote 16, we pull together a series of these
10:11 10 reputational injury cases, and all of them, your Honor, all of
11 them come out the same way, which is, at the summary judgment
12 stage, you know, let aside the PI, but at the summary judgment
13 stage, it's not enough to just say "damage to reputation
14 because you're talking about us." You have to identify an
15 actual sale lost or other discernible injury, something that's
16 not speculative. You know, *Dependable Sales & Service v.*
17 *Truecar*" from the Southern District 2019, that's the first case
18 we cited.

19 THE COURT: Don't cite them all out.

10:12 20 MR. MANGI: Yeah, yeah, they're all there in the
21 briefing. But the point, your Honor, is at this stage, it's
22 not enough to say, "Well, you can figure it out," because
23 there's nothing in the record to figure it out from. There is
24 no evidence of any discernible injury in that sense.

25 Then, your Honor, let me just touch briefly on a few

1 other points. And as regards their expert, Ms. Kirk Fair's,
2 other methodology focusing on competition between the parties,
3 it's exactly the same issue because there is zero causal
4 connection to the BPM.com report --

5 THE COURT: Well, you're saying that, but you could
6 draw a reasonable inference that they saw that report, and
7 there was head-on-head competition while the report was up,
8 that it played a role.

9 MR. MANGI: Your Honor, I would suggest that there
10:13 10 needs to be evidence that it played a role, and they're free to
11 develop that record. They had three years to develop that
12 record; you know, call in the customers, subpoena the
13 customers. We subpoenaed some customers and got their
14 documents, and we've got evidence on our case of people saying,
15 "This is very concerning. This is how we won based on this
16 advertisement." They've got none of that. It's not enough, I
17 would suggest, to just say, you know, it's out there. In fact,
18 their expert expressly disclaims any causal link. So it's not
19 enough, I would submit, your Honor, to just suggest it was
10:13 20 about them, so that gets them over the hump. You have to show
21 it mattered, that people read it, that they cared about it,
22 that it was a factor in their decision for there to be
23 actionable injury. Again here, they're seeking monetary
24 relief. If they come to your Honor --

25 THE COURT: They're seeking not damages but

1 disgorgement, which is a little different.

2 MR. MANGI: A little different, your Honor, but
3 doesn't change the fundamental fact that they need to show
4 injury to be able to get there.

5 THE COURT: So I guess the point is whether or not
6 when I draw all reasonable inferences their way, just a
7 head-on-head win during that time period, is that enough to
8 support a reasonable inference that it played a motivating role,
9 causative role?

10:14 10 MR. MANGI: Yes, your Honor.

11 THE COURT: You're saying that. Okay, thank you. I
12 think we need to go on to the next issue.

13 MR. AUSTIN: Thank you, your Honor. Just by way of
14 introduction, I'm going to split this argument with my
15 associate, Jim Gross, but just to set the stage on our
16 defensive motion --

17 THE COURT: Are you an associate?

18 MR. GROSS: I am.

19 THE COURT: Have you ever argued in Federal Court?

10:14 20 MR. GROSS: I have, your Honor.

21 THE COURT: Oh, all right, so I can't sort of do my "I
22 won't be too mean" thing?

23 MR. GROSS: Thank you, your Honor. I appreciate that.

24 THE COURT: I can be as mean as I want?

25 MR. GROSS: You can be as mean as you want, your

1 Honor.

2 THE COURT: All right, okay, that seems good.

3 MR. AUSTIN: So, your Honor, there are four
4 overarching reasons -- and I'm focusing first on our defensive
5 motion because I want to make sure we come to address laches
6 because I think that's a real big problem in Appian's case --
7 there are four overarching reasons that we say judgment should
8 enter in our favor on their claims. The first is that the
9 counterclaims are time barred, and Mr. Gross is going to
10:15 10 discuss that.

11 The second is that Appian can't prove key elements of
12 its claim, including falsity, deception, and materiality.

13 The third is that many of these challenged materials,
14 putting aside the Sinur paper for just a moment, they're not
15 commercial advertising. They just weren't -- there's no
16 intention. There's no evidence that there was an intent to
17 penetrate the relevant market. They're just a handful of sort
18 of random and occasional distributions.

19 And, finally, the LinkedIn post claim still, your
10:15 20 Honor, the defamation claim, Mr. Gross will also discuss that
21 one. And if you find our way on Mr. Gross's arguments, the
22 laches and the LinkedIn post claims, effectively that a
23 judgment should enter in favor of Pegasystems.

24 THE COURT: The thing I would not spend time on, I do
25 not understand your technology well enough. I did not spend

1 any time on it. There are technical claims like, "This was a
2 lie and this was a lie." I'm not going into that.

3 MR. AUSTIN: We'll spare you that today, your Honor.

4 THE COURT: No, I'm not doing it on summary judgment.
5 There are, like, eighteen points that you say are false, and
6 it's not well explained about what it even means. Both of you
7 do it. I'm just not doing it. I'm not doing it on your
8 affirmative claim that I should find summary judgment in your
9 favor on the BPM report or on the defensive, "This is why it's
10:16 10 false." It needs expert, almost like a tutorial on what you're
11 talking about. So I don't want you to use your time doing
12 that, okay?

13 MR. AUSTIN: Understood, your Honor.

14 MR. GROSS: Thank you, your Honor. While I'm about as
15 tall as Mr. Mangi, I'm not as loud, so I'm going to use the
16 podium, if that's okay.

17 THE COURT: That seems good. But let me just say
18 this: We now have 45 minutes before I have to do this
19 sentencing, so, ideally speaking, if you did, I don't know, 20
10:17 20 and 20.

21 MR. GROSS: Thank you, your Honor. Jim Gross of
22 Foley Hoag on behalf of Pegasystems. While the screen is
23 switching over, your Honor, I just want to quickly address,
24 there was a supplemental authority letter that was brought up.
25 We obviously have not responded. We're not going to burden the

1 Court with more briefing on that point, but just two quick
2 points about that case, your Honor, the *Universal Life* case
3 that Mr. Mangi just cited. The first is, your Honor, at no
4 point in their briefing has Appian previously tried to draw a
5 distinction between the applicability of a presumption at the
6 injunctive relief stage for injunctive relief versus monetary
7 relief. In fact, their entire argument was, under *Lexmark*, no
8 matter what, you need evidence, and that court expressly
9 rejected that argument.

10:17 10 The second point, your Honor, the court there said,
11 "You have not pointed us to any case in which monetary relief
12 was granted on a presumption," but the very case that cites for
13 that proposition was *Porous Media*, which upheld a \$1.5 million
14 monetary judgment on disgorgement grounds. That, of course, is
15 not the only case that has done that. Your Honor in *HipSaver*
16 dealt with a disgorgement-of-profit claim. In addition, the
17 Second Circuit case, I think it's *Merck AG* -- it's cited in our
18 papers, I think in 2014 -- expressly holds that monetary
19 damages are available with a presumption. So to the extent
10:18 20 that that Western District of Washington --

21 THE COURT: The problem here is, your economic injury
22 was rebutted because there was none, so it's a little harder on
23 reputational.

24 MR. GROSS: Understood, your Honor, and I don't want
25 to go back into those arguments. I do think on disgorgement,

1 what *Porous Media* says is: We're no longer looking at just
2 reputational injury. You don't have to show any evidence for
3 the presumption. You do need some sort of link, something your
4 Honor has hinted at, tying back the disgorgement amount to the
5 challenged advertising; and as Mr. Austin explained, the expert
6 report we think provides that requisite link. We understand
7 you had a --

8 THE COURT: Zero to hundred percent link.

9 MR. GROSS: Well, again, there are multiple categories,
10:19 10 as Mr. Austin explained, and we'll submit our point on that.

11 But what I'm supposed to talk to you about, your
12 Honor, is the issue of laches. So unlike Pegasystems which
13 brought suit two months after the BPM.com report was filed, the
14 evidence here shows that Appian waited at least 70 months
15 before it thought to challenge the purported advertising
16 campaign that's at issue in this case. Laches bars that sort
17 of lie-in-wait approach, as multiple Courts of Appeal decisions
18 make clear, including in cases that Appian itself cites, like
19 the Seventh Circuit's decision in *Hot Wax* and the Ninth
10:19 20 Circuit's decision in *Jarrow Formulas*. And three key legal
21 principles emerged from those cases, which apply here, show
22 that Pegasystems is entitled to summary judgment on all of the
23 claims related to challenged documents.

24 Principle number one, that laches runs from the first
25 time that Appian knew or learned of the purported advertising,

1 even if that advertising then continued.

2 Principle number two is that when that knowledge point
3 began outside the applicable limitations period, laches
4 presumptively applies, and the burden is on Appian to show
5 otherwise; and there is quite literally no evidence in the
6 record submitted by Appian on this point.

7 And, third, summary judgment is appropriate on laches
8 grounds even as to knowingly false advertisements. So I'll
9 take each of those in turn, your Honor.

10:20 10 Point number one is that laches runs from the first
11 time that Appian became aware of the purported advertisement
12 campaign, as *Jarrow* and *Hot Wax* previously recognized. And
13 this, of course, makes sense because if a party could just
14 simply lie in wait under a continuing-wrong type of theory,
15 then laches would be a spineless defense because the party
16 could theoretically wait to bring suit until it was convenient
17 for it to do so, even if it was years down the line. That
18 would hardly be equitable, and, of course, laches is an
19 equitable defense.

10:20 20 So this is true even if the campaign changed around
21 the edges in the meantime. For example, in *Hot Wax*, the
22 plaintiff tried to explain away its delay in bringing suit by
23 saying there had been, quote, "evolutionary development" in the
24 advertising campaign at issue there, there related to the
25 defendant's car wax and the characteristics thereof. The

1 Seventh Circuit rejected that argument and said, because the
2 core message of that advertising campaign remained the same --
3 again, the characteristics of the car wax -- the knowledge
4 point for when laches presumptively applied, it ran from the
5 first time the plaintiff learned of the campaign.

6 That's significant here for two reasons, your Honor.
7 The first is, while Appian purports to be challenging a wide
8 series of documents, they're actually challenging what they
9 claim is a single advertising campaign. And they make this
10:21 10 point in their own papers. So if we look at Slide 26, for
11 example --

12 THE COURT: Wait a minute. So I hear your point loud
13 and clear about the Sinur advertisement, but I think other -- I
14 can't sort of say, oh, you lose on laches on Sinur, but all
15 these other ones lose too because it's part of the same
16 campaign, if they're separate documents.

17 MR. GROSS: I don't think that's correct, your Honor.

18 THE COURT: Why?

19 MR. GROSS: Because --

10:22 20 THE COURT: In other words, some of these slide decks
21 and scalability documents, I'm not sure they're advertising
22 documents.

23 MR. GROSS: Understood, understood.

24 THE COURT: That's a different point. But the Sinur
25 paper is what it is, and if they knew about it, which they

1 apparently did, laches is a strong argument. But some of these
2 other things were separately marketed to -- I forget, the
3 scaleability paper, the -- what was the other one?

4 MR. GROSS: The technical competitive brief, your
5 Honor.

6 THE COURT: Yes.

7 MR. GROSS: Yes.

8 THE COURT: So I think it's when they knew about those
9 documents.

10:22 10 MR. GROSS: Respectfully, no, your Honor, and here is
11 why: Because according to Appian, the Sinur paper merely
12 parrots those exact same documents. So the language and the
13 message contained in those other materials, the technical
14 competitive brief and the white paper, is the same thing that
15 was said in the Sinur paper. And, again, this is not our
16 characterization. If we look at the next slide, for example,
17 in their opposition brief on Pages 6 and 7, they say that the
18 Sinur paper parroted many of the same false claims in the
19 technical competitive brief. If we go to the Supplemental
10:23 20 Statement of Facts on the next slide, they say again, the draft
21 of the Sinur report closely resembles claims about Appian that
22 Pegasystems previously included in the technical competitive
23 brief and the scaleability white paper, in fact, including
24 extensive charts in Paragraph 68 that lines up all of the
25 similarities.

1 So all of these documents make the very same purported
2 advertising claims that are challenged here, and that is
3 significant, your Honor, because, as your Honor previewed, the
4 Sinur rebuttal document conclusively shows that Appian knew
5 that Pegasystems was engaging in this advertising campaign, as
6 evidenced by its response thereto, as well as Pegasystems' role
7 in it, and the evidence makes this unequivocally clear. So we
8 know this from the Sinur rebuttal itself which we'll see on
9 Slide 29 in which --

10:24 10 THE COURT: Could you go back for a minute?

11 MR. GROSS: I sure can, your Honor.

12 THE COURT: So the technical competitive brief, I was
13 having more problems with whether they were advertisements or
14 not. So was that circulated to clients?

15 MR. GROSS: It is not, your Honor. So, of course, on
16 the merits, as Mr. Austin is going to address, we dispute that
17 any of this is advertising at all, right? And so therefore it
18 cannot be subject to a Lanham Act claim. But if we're wrong
19 about that, then their argument fails on laches grounds because
10:24 20 the things that they are challenging in these documents are all
21 the same things that were contained in the Sinur paper, and
22 that's according to their own statement of facts.

23 And so the starting point for the laches analysis
24 begins at least in 2014. That's when they knew. Then they
25 issued the Sinur rebuttal. And that includes all of the

1 messaging that's included in all these other documents that
2 they seek to challenge in their amended counterclaims.

3 So, your Honor, I think you understand the point about
4 the Sinur rebuttal, so I'll just quickly run through it. So we
5 see in the Sinur rebuttal itself, of course, they're addressing
6 the claims made in the Sinur paper, again, the claims that
7 parrot things that were previously made in the scalability
8 white paper and the technical competitive brief, as well as
9 the, quote, "known fact" that Pegasystems was involved.

10:25 10 To the point I was just making, your Honor, on
11 Slide 30, when they were drafting the Sinur rebuttal, we have
12 some internal communications from Appian, which of course they
13 point out again that it's a contract piece and a paid attack.
14 But if you look at the communication from Ms. Astle, she says,
15 "This fits with what we are seeing at Roche, a potential
16 customer." In other words, what is being said in the Sinur
17 paper are the exact same scalability attacks that are the
18 subject of the other documents that are at issue in this case.

19 So that emphasizes our main point, your Honor, which
10:25 20 if the Sinur paper is truly just parroting the same claims,
21 these are all subject to the same laches knowledge point of at
22 least 2014, which falls well outside the four-year period that
23 your Honor previously recognized at the motion to dismiss
24 stage.

25 THE COURT: Okay, thank you.

1 MR. GROSS: May we move on to Slide 34 just quickly.
2 Your Honor, we have a number of points about their knowledge of
3 the Sinur rebuttal. I think that you understand these, but
4 there are other points emphasizing the one I just made, other
5 evidentiary pieces showing again that Appian was on knowledge
6 of this same purported advertising campaign, regardless of
7 whether it knew -- regardless of whether they were based in
8 other documents.

9 So, for example, in October, 2013, approximately six
10:26 10 months before the Sinur paper was ever published, we see
11 complaints, internal Appian correspondence complaining about a
12 presentation that Pegasystems had made about Appian challenging
13 its ability to scale. And the response from Ms. Epstein is,
14 "It would be very useful to get this for future reference
15 because this is not the last time they're going to give such a
16 presentation about us." Again, highlights the knowledge of the
17 use of these purported advertising materials that are at issue
18 here.

19 We have further evidence of this from 2015, your
10:27 20 Honor, in February, again external correspondence at Appian
21 highlighting that Pega is trying to convince potential
22 customers that Appian can't scale. And then, as we have on the
23 next Slide, of course, is the production of the technical
24 competitive brief in the *Maxwell* litigation.

25 Now, on this point, your Honor, Appian pointed out

1 that this is produced pursuant to an "attorneys' eyes only"
2 confidentiality designation, and we did correct that point and
3 state otherwise in our reply brief. But the core point is,
4 your Honor, the documents that are the subject of the amended
5 counterclaims here, the technical competitive brief, the
6 scaleability white paper, et cetera, those were also produced
7 under an "attorneys' eyes only" confidentiality designation in
8 this case. And that, of course, didn't prevent Appian from
9 bringing suit about them because they asked Pegasystems to
10:27 10 lower the confidentiality designations so that they could
11 evaluate whether to bring a claim, and that's exactly what
12 ended up happening. They could have done the exact same thing
13 in 2016 when they received this document. They simply chose
14 not to do so.

15 So looking at this holistically, your Honor, we think
16 the evidence is overwhelming and no reasonable juror could
17 conclude anything other than that Appian knew about this
18 advertising campaign. It just simply chose not to do anything
19 about it.

10:28 20 And so that leads to the second core legal point, your
21 Honor, which is that because the challenged conduct began
22 outside the relevant laches period, laches presumptively
23 applies, and the burden is on Appian to show otherwise. And we
24 think this is, frankly, dispositive, your Honor, because there
25 is not a single undisputed fact from Appian, either in response

1 to Pegasystems' statement or in its own affirmative statement,
2 showing that its delay was reasonable or that Pegasystems was
3 not prejudiced by this delay. And that's significant, your
4 Honor, because as Appian's own case law confirms, Pegasystems,
5 as not having the burden, didn't have to introduce any evidence
6 to win on this point. And this is just a quick quote from the
7 *Giese* case cited by Appian on Page 12 of their brief, a
8 District of Massachusetts case. Quote, "Giese merely points to
9 weaknesses in the defendants' affirmative proof of prejudice.
10:29 10 Such an attack is, of course, unavailing, inasmuch as the
11 defendants could have remained utterly mute on the issue and
12 nonetheless prevailed. Giese has failed to come forward with
13 any evidence demonstrating a lack of prejudice as to any of the
14 defendants, and thus failed to burst the presumption bubble
15 with a 'no prejudice' lance."

16 The *Giese* case there is actually quoting from a case
17 called *Hall*, a Federal Circuit case which is also cited in
18 Appian's opposition brief at Page 13, and both of those cases
19 granted summary judgment to the defendant on laches grounds due
10:29 20 to the plaintiff's failure to introduce evidence of a lack of
21 prejudice here.

22 And, of course, in this case, as you know from the
23 briefs, Pegasystems did not simply stand silent. We did
24 introduce significant evidence of prejudice. Most prominently,
25 your Honor, the damages claim here is severely inflated as a

1 result of Appian's delay. That's exactly what the Seventh
2 Circuit found in *Hot Wax*, the Ninth Circuit found in *Jarrow*
3 *Formulas*, and this Court found in the *John G. Elden* case is
4 sufficient to establish prejudice for laches purposes.

5 There is also, through no fault of Pegasystems, there
6 was a significant loss of emails in 2017 from Pegasystems due
7 to a data migration that sort of went awry with a third-party
8 vendor. They lost about 50,000 to 100,000 emails that could
9 potentially bear on the issues in this case. And as we point
10:30 10 out in our briefing, numerous witnesses, including Appian's own
11 witnesses, just simply could not remember certain details,
12 given the amount of time that's passed.

13 The only other point I'll make on this, your Honor,
14 is, it's a two-pronged issue, right? It's prejudice but also
15 reasonableness of delay. There's also no evidence that
16 Appian's delay here was reasonable, and in fact we know the
17 reason for their delay. We can actually just go back to what
18 is Slide 31. Appian's CEO, Matt Calkins, upon learning of the
19 Sinur paper, said, quote, "It is also okay to ignore the event
10:31 20 entirely." In other words, Appian just didn't think the Sinur
21 paper was worth addressing, and that's why they didn't bring
22 suit, your Honor. That is not a reasonable delay, and the fact
23 that they now launch a weapon to fight back in this litigation
24 is not a sufficient basis to avoid the application of laches.

25 The third core legal principle that arises from the

1 cases, *Hot Wax* and *Jarrow Formulas*, is that summary judgment is
2 appropriate on laches grounds, even when there's a dispute of
3 fact as to whether or not the advertising was knowingly false,
4 and *Hot Wax* and *Jarrow* make this point expressly. And this, of
5 course, makes sense because if --

6 THE COURT: Am I going to have to get to that if they
7 delayed bringing the suit?

8 MR. GROSS: We don't think you do, your Honor. The
9 reason I raised it is because as Mr. Mangi I think previewed in
10:32 10 his opening, he said, "Oh, Appian's knowledge of the falsity of
11 these things bears on the equitable issues at play here," which
12 I take to mean that Appian is going to say that Pegasystems'
13 hands are unclean, and therefore they can't invoke laches as an
14 equitable remedy.

15 THE COURT: Oh, I see.

16 MR. GROSS: And in the Lanham -- and, again, at the
17 risk of making Appian's argument for it, but the problem with
18 that argument, your Honor, is that case law is clear that in
19 the Lanham Act context, you need a whole lot more than just
10:32 20 some evidence that the advertising at issue was knowingly
21 false. Of course, we dispute this is advertising at all, and
22 we certainly don't agree that it was knowingly false.

23 THE COURT: As I've said, I don't think I have enough
24 of a basis for --

25 MR. GROSS: Understood, understood.

1 THE COURT: -- falsity the way it's been explained in
2 the briefs, and I don't want any more.

3 MR. GROSS: Exactly, your Honor, but even on that --
4 so taking the assumption that there's a dispute of fact on that
5 issue, that was the case in *Hot Wax*, and that did not preclude
6 the application of laches. In that case, the District Court
7 was faced with both a summary judgment motion on the merits of
8 the false advertising claim as well as a laches defense. The
9 Court rejected summary judgment on the merits saying there's a
10:33 10 dispute of fact here as to the falsity issue, but it
11 nonetheless granted summary judgment to the defendant, the
12 party in Pegasystems' position here, on the issue of laches
13 because it said knowingly false -- the fact that they might
14 have known these advertisements were false cannot, standing
15 alone, constitute unclean hands. Instead, you need some sort
16 of evidence of actual fraud. It was a much significantly
17 higher burden, and there's just simply no evidence of that
18 here. That was also the case in *Jarrow*.

19 Now, as to what sort of conduct might give rise to
10:33 20 that actual fraud standard, we, frankly, don't know because the
21 cases that Appian cites don't go there. The closest they come
22 is an Eastern District of Pennsylvania case, which is -- it is
23 the *Merisant* case. That case is different for a whole wide
24 variety of reasons, but the unclean hands issue there was that
25 the party -- this was about Splenda and whether it was in fact

1 artificial or natural, so that involved a public health issue
2 which necessarily implicated the public interest aspect, of
3 course, very relevant in an equitable remedy like laches. But
4 beyond that, there was evidence of a destruction of evidence,
5 an attempt to cover up --

6 THE COURT: I don't know that I need to go into --

7 MR. GROSS: I agree, your Honor, but I just want to
8 point out the sort of conduct that's necessary to prevail on an
9 unclean hands defense to deckle remedy of laches.

10:34 10 THE COURT: Thank you very much. Okay, let's move on.

11 MR. GROSS: So that's all the points on laches, your
12 Honor. We do have, you know, there are other merits arguments
13 as to the other --

14 THE COURT: Well, I think we need to get to them
15 because I do have a question about whether they're actually
16 advertising materials.

17 MR. GROSS: Terrific. I'll turn it back to Mr. Austin
18 then.

19 THE COURT: But you're almost out of time.

10:35 20 MR. AUSTIN: We can do it in two minutes, your Honor.
21 We have one slide that I think will make the point very
22 effectively. Can we put up Slide 24, and apologies for the
23 informality.

24 THE COURT: Are you kidding? It's casual Friday. I
25 should have asked you all to just come in khakis.

1 MR. AUSTIN: The first time I've worn a suit in, like,
2 two years.

3 THE COURT: Yes, who was it who wanted to come in
4 person? Are you the New Yorkers? Are you all back in the
5 office?

6 MR. MANGI: We are, your Honor. Not everyone is, but
7 I am.

8 MR. AUSTIN: So as promised, within two minutes, your
9 Honor. These four documents here are -- these aren't the Sinur
10:35 10 paper, and they actually are two of the so-called "challenged"
11 materials, that all they really do is repeat what the Sinur
12 paper says, so those aren't included here. The number of
13 distribution of those are also quite low. But here, here they
14 are. These are the numbers of distribution, the scalability
15 slide deck distributed outside of Pegasystems one time to one
16 organization over a several-month period. Okay, clearly that's
17 not an intention to penetrate the market.

18 The scalability white paper distributed outside of
19 Pegasystems six times to five unique customers over a period of
10:36 20 three years, absolutely not any intention there to penetrate
21 the market.

22 The Pega 7 versus Appian comparison chart, five
23 distributions, five unique organizations over the period of
24 more than a year.

25 And then, finally, the technical competitive brief,

1 thirty total distributions to fifteen unique organizations over
2 a period of five years. So, again, just do the math. There's
3 no way that those numbers demonstrate --

4 THE COURT: I don't know any cases that do it straight
5 up on a mathematical basis.

6 MR. AUSTIN: Well, the case law doesn't really do
7 that --

8 THE COURT: It's kind of a unique market because it's
9 so specialized and customized, so it's hard to figure out what
10:36 10 advertisement means in this context.

11 MR. AUSTIN: Yeah, I mean, advertisements can look
12 different. Obviously this is not a 30-second, you know, spot
13 on during the Superbowl, but -- so the fact that it's a white
14 paper, that's not our point so much as there has to be an
15 intention to -- in distributing the materials, there has to be
16 evidence of an intention to penetrate the market, and that's
17 just not present here at all, your Honor.

18 And the other thing I would add is, there are cases,
19 of course -- you've probably read them or are familiar with
10:37 20 them -- in which a relatively low number of distributions is
21 nevertheless deemed to be advertising. That only applies in
22 cases with a small market. And just by point of reference,
23 Appian's most recent 10K refers to the fact that they have over
24 a hundred customers. This isn't a small market, so these
25 numbers just don't suffice for commercial advertising.

1 Thank you.

2 THE COURT: Thank you.

3 MR. MANGI: Your Honor, I'll ensure we're done in time
4 for 11:00. In terms of the *Daubert*, your Honor, I think we'll
5 rest on the papers, with apologies to my colleague, one of whom
6 it was going to be her first argument, an associate.

7 THE COURT: Wait, wait, wait, wait. I like people to
8 be able to say "I argued in Federal Court," so let's have you
9 finish around ten of, and then you do a quick spiel on your
10:38 10 *Daubert*. Is that okay?

11 MS. ROBINSON: Sounds great, Judge. Thank you.

12 THE COURT: How many years out are you?

13 MS. ROBINSON: From law school? I guess three and a
14 half?

15 THE COURT: All right, it's time, okay, as long as I'm
16 not pouncing on someone who just took the Bar.

17 (Laughter.)

18 MR. MANGI: Mr. Sochynsky has argued before, so we'll
19 focus that on Ms. Robinson. Okay, so can we switch over again,
10:38 20 please.

21 THE CLERK: Yes.

22 MR. MANGI: Thank you. Okay, so, your Honor, the
23 motion that they have made for summary judgment affirmatively
24 on the BPM claims, I'm not going to deal with that because your
25 Honor is not going into claims of falsity.

1 THE COURT: No.

2 MR. MANGI: So I'm just going to focus on whether our
3 counterclaims should survive and go forward. Now, I'll skip
4 over a couple of these.

5 Okay, your Honor, this is the range of the advertising
6 that we are challenging here. There are a number of different
7 advertising pieces. And let me point out a few things, your
8 Honor. Let me deal first with the commercial advertising issue
9 that came up right at the end there.

10:39 10 First, the record shows, your Honor, these are
11 advertising pieces that were designed and intended to be a live
12 use leave-behinds with customers. So, for example, when it
13 comes to the technical competitive brief, we have evidence in
14 the record, in the summary judgment record in our findings that
15 shows, for example, their CEO, Alan Trefler, took this to a
16 customer who, rather than can use it as a live prop in a
17 meeting, he said that would blow up the deal using that. We
18 have evidence in the record showing that they said, "Now that
19 we have these materials, we should never lose against Appian."
10:39 20 We have emails saying, "We must deploy these every time we're
21 competing with Appian on every deal."

22 So the fact that they say they lost a number of
23 emails, and so now when they look at the emails from 2012, they
24 can only find a certain number of distributions, that doesn't
25 matter. We're going to show at trial that they used these

1 pieces pervasively throughout the market, and they used them as
2 live pieces, live advertising.

3 Let me also just flag, your Honor, that the law on
4 this --

5 THE COURT: The one at the end, which is the slide
6 deck, was apparently only used once. Is that enough?

7 MR. MANGI: Yes.

8 THE COURT: Well, let me ask this: Should I just
9 cherry-pick one by one, this one is, this one isn't?

10:40 10 MR. MANGI: You shouldn't, your Honor, for two
11 reasons. One is, all of these, including the slide deck, were
12 intended for use as live pieces. So therefore the fact that
13 they may say there's only one email, we're going to have
14 witnesses that testify these were designed for use anytime
15 there is competition.

16 THE COURT: Maybe, but I don't know that I have that,
17 do I?

18 MR. MANGI: I believe it is in our findings, your
19 Honor. Yes, for example, with the scalability white paper,
10:40 20 you know, our findings, 38 at Page 187, we point out them
21 sharing it at various accounts, including AT&T, Pfizer, FedEx,
22 UPS, Novartis, and the FCC. So, you know, there is more
23 evidence in the record than that chart lets on. But let me
24 point out this, your Honor. Nonetheless --

25 THE COURT: Excuse me. What was that?

1 MR. MANGI: That is our Supplemental Statement of
2 Material Facts, Paragraph 38, Page 187 of the document. But
3 let me point out, your Honor, that --

4 THE COURT: But let's say I say you're right, okay, on
5 that one, that it was shown widely enough to be an
6 advertisement, but there might be others that were shown once,
7 like the slide deck. I don't know how I assess -- are you
8 agreeing with Pegasystems that I should think about it as a
9 whole campaign?

10:41 10 MR. MANGI: No, your Honor. Well, let me parse it
11 out, your Honor. Here's the issue: They're all different
12 advertisements. They are addressing -- they're all under the
13 same umbrella of suggesting that, you know, "If you have a
14 serious project, look at Pega; you can't look at Appian." But
15 that doesn't change the fact that they're different
16 advertisements making different claims. And sometimes some of
17 the claims are technically similar, sometimes they have
18 different variants, but these are all different pieces of
19 advertising.

10:42 20 And let me point out, your Honor, that the law --

21 THE COURT: You would say laches would apply
22 differently to each one?

23 MR. MANGI: Yes, absolutely. I'm going to get to that
24 in just a second.

25 THE COURT: What's sauce for the goose is sauce for

1 the gander. You think about it, if it's advertising and you
2 knew about it one by one --

3 MR. MANGI: On laches the analysis -- it is
4 advertising, but that doesn't mean we knew about all the
5 advertising. We knew about one piece of advertising, which was
6 the Sinur report, and we had limited knowledge on that, but we
7 knew about that one. But we didn't know about the others at
8 all. Let me deal with that, your Honor. I'm going to get to
9 that very specifically in just a moment.

10:42 10 I just want to make one other point on this, though,
11 which is, the case law, your Honor, we cite at Page 24 of our
12 brief the *Seven-Up* case, makes clear that even one use in
13 advertising is sufficient under the Lanham Act because that's
14 commercial advertising. And it depends on the market. You
15 know, if you're advertising chocolate bars, then, sure, you
16 need to show some wide consumer campaign, but here these are
17 specialized, customized products, and so even one use is
18 enough.

19 THE COURT: Let's say a salesperson goes into
10:43 20 somebody's company and writes out scribbles, you know, "Here's
21 what's good about Appian over Pegasystems," and it turns into a
22 piece of paper, side-by-side comparison, I imagine in a
23 customized presentation you might do that.

24 MR. MANGI: Yes.

25 THE COURT: Depending on if you're a shoe manufacturer,

1 as you said, or one mom-and-pop COVID, you might sort of -- do
2 you consider that an advertisement?

3 MR. MANGI: I would say, your Honor, it's a very
4 fact-dependent analysis. But let's say they're designing, you
5 know, highly customized shoes that cost millions of dollars,
6 and they're coming in for this one client in, you know, a high
7 methods-based trail, that could qualify as commercial
8 advertising.

9 THE COURT: What's the difference between that and a
10:44 10 sales pitch? You're saying there is none.

11 MR. MANGI: Well, it depends, your Honor, again on the
12 market because if it's a mass-scale retail product, then one
13 instance absolutely not enough; I agree with you. But here
14 where it's a highly customized product, even a single use
15 absolutely can be enough.

16 THE COURT: I don't know. It's not usually what you
17 think about as advertising.

18 MR. MANGI: Sure, absolutely.

19 THE COURT: I get it when you're putting it up on your
10:44 20 website for everyone to see, that's advertising.

21 MR. MANGI: Yeah.

22 THE COURT: It's a little harder when it's a customized
23 document, and then these sometimes fall in between that.

24 MR. MANGI: But I will say, for these, your Honor, the
25 scaleability white paper, the technical brief, you know, for

1 these there is evidence in the record that we have put in; you
2 know, these are intended for use wherever there's competition
3 and intended as live leave-behinds. Sinur was used throughout
4 the market up on the website, used --

5 THE COURT: The problem I have with Sinur, which is
6 you really do have to get to laches, and I think that's a
7 pretty strong argument.

8 MR. MANGI: Yeah, let's go straight there. Okay.

9 Okay, so laches, your Honor. So there are really
10:45 10 three elements to the laches test, just to be clear: One, they
11 have to show that we have engaged in unreasonable and
12 inexcusable delay. Two, they've got to show that they were
13 prejudiced. And, three, even if both those things are satisfied,
14 that just lays the foundation. Then your Honor has to engage
15 in the equitable determination of, should it nonetheless be
16 applied in all of the circumstances of the case?

17 Okay, now, your Honor pointed out also in your ruling
18 in the case that laches is a fact-sensitive inquiry, typically
19 not subject to resolution pretrial, and that is, I would
10:45 20 suspect, proven very true ultimately here.

21 Now, here's the divide I was pointing your Honor to
22 earlier. On the Sinur report? Yes, we knew it was out there
23 and that they were using it in the marketplace. We didn't know
24 conclusively the origins of it. We certainly didn't know our
25 injury stemming from it, and I would submit that all of that is

1 necessary to trigger even the first prong. But as to the
2 others, your Honor, there is zero evidence in the record that
3 we knew they were using any of these advertising pieces in the
4 marketplace.

5 THE COURT: These other ones on the other side?

6 MR. MANGI: Everything on the right-hand side,
7 everything other than Sinur.

8 THE COURT: What do you think about the argument,
9 Pegasystems was pressing that this was all part of one
10:46 10 advertising campaign with all the same basic claims?

11 MR. MANGI: Yeah, your Honor, it's certainly true that
12 they are making a general unified claim that for a big project,
13 you've got to use Pega. That is a unifying factor, no doubt,
14 but that doesn't change the fact that these are all pieces
15 making different claims in different ways in service of that
16 theme, which spins on technical themes.

17 For example, let me just give you just one very
18 specific example. In the scalability slide deck, your Honor,
19 they put up a slide deck where they say, oh, you know, we
10:47 20 have -- here, it's at Slide 63. Can we go to 63, please.

21 They put up a side deck, your Honor, where they say,
22 "Look, let's do a comparison of Pega and Appian on all of these
23 factors that bear on who you can use in a big case." This is
24 something that is only in the scalability slide deck. It's
25 not in any of the other pieces. So they give these relative

1 scores. And then, when we did the discovery on where are these
2 scores coming from -- this is the man who actually created
3 them -- he says, if I may use his direct words, he says "It's
4 bullshit." He says, "We just made the numbers up. They've
5 been arbitrary. We wanted to make ourselves look good." That
6 is not a claim that is repeated in any of the other advertising
7 pieces that we're talking about. So that just gives you an
8 example --

9 THE COURT: You're saying that they were different
10:48 10 enough not to --

11 MR. MANGI: Absolutely. And we didn't even know about
12 the advertising. There's no way they even get started on that
13 issue, and we didn't.

14 So then, your Honor, let me get to the issue of
15 prejudice, and now I'm focusing on Sinur because on the others
16 there's no suggestion we even saw them. And I think
17 Ms. Robinson's argument, five minutes will cover what she had
18 planned to do, so I'll take another five, if that's okay.

19 So when it comes to the issue of prejudice, your
10:48 20 Honor, the cases are clear -- we cite them in our brief,
21 including from the First Circuit -- there has to be a clear
22 showing of prejudice. It's not enough to just suggest it. And
23 what do they really point to as their prejudice? They say two
24 things: One is that, you know, "We lost some emails during an
25 upgrade, and one employee left, and we don't have his emails

1 anymore." But if you look at the time frame, your Honor, all
2 of those things happened within four years of the Sinur report
3 first being published; and that is categorically irrelevant as
4 a matter of law to a showing of prejudice because they need to
5 show that they were prejudiced by something that happened after
6 those four years had elapsed. You know, we cite here some of
7 the cases that establish that principal actions undertaken
8 before the delay may not figure at all into the analysis. So
9 they have absolutely no actionable showing of any prejudice
10:49 10 stemming from this.

11 I'll also point out that in their own interrogatory
12 response, they say, you know, "We had no idea. Yeah, we lost
13 some emails. We had no idea what was in them." Well, that's
14 not good enough. Again, under the First Circuit precedent,
15 they have to show there was something --

16 THE COURT: It does run against the grain, though, to
17 allow you to sit on a claim, just sit there while your claims
18 are accumulated and damages, without your even putting them on
19 notice that -- in fact, one of the emails was, "Hey, we're
10:49 20 going to fight them in the marketplace where this isn't even
21 worth the effort," and then suddenly now, in your litigation
22 combat mode, you assert it.

23 MR. MANGI: Well, focusing on Sinur, your Honor,
24 because that's what we're really talking about here --

25 THE COURT: Really, that's what we're talking about.

1 MR. MANGI: Yeah, that's what we're talking about.

2 Let me address that issue. You know, first of all --

3 THE COURT: It feels as if you saw it on your hands.

4 MR. MANGI: Yeah. Well, let me explain that, your
5 Honor, first, from a practical perspective, then from a legal
6 perspective. From a practical perspective, Appian knew that
7 the Sinur piece was being used out there. We didn't know the
8 extent or the way in which they were using it or the injuries
9 that were done to us, but here's another important point, your
10:50 10 Honor. And I mention this because, remember, the test, your
11 Honor, is even if you have delay, even if you have prejudice,
12 neither of which you have here --

13 THE COURT: Well, you're claiming damages for this
14 entire period where you didn't squawk.

15 MR. MANGI: Well, the law is clear, your Honor, that
16 the mere increase in damages alone over time does not grant
17 prejudice.

18 THE COURT: What about loss of memory?

19 MR. MANGI: There's no suggestion here, your Honor,
10:50 20 that there is any actionable or material loss of memory on key
21 issues. But let me point out the key point here, your Honor,
22 just on the practical point of "why," which is you're asking
23 why didn't we do this, at the time, we didn't know the extent
24 of any of this. But it's a very different situation, your
25 Honor, where they then -- remember, they used the Sinur report.

1 They didn't disclose it was commissioned. They in fact had
2 emails that we have in the record where they go out and tell
3 the market, "This Sinur report, this was not commissioned by
4 either party. This is independent." Their own website said
5 it's independent and objective. Never been anything like that
6 with the BPM.com --

7 THE COURT: All right, we need to move on to the last
8 one.

9 MR. MANGI: Yes. This is the last point, your Honor,
10:51 10 that the equation changes once they have filed suit against us.
11 In that situation, for them to be able to say, "Oh, sorry, you
12 didn't sue us earlier," when they are doing the exact thing,
13 that becomes inequitable.

14 THE COURT: All right, thank you. All right, so --

15 MR. GROSS: Your Honor, I feel a kinship to my fellow
16 associate, but I have one minute for rebuttal.

17 THE COURT: Go ahead.

18 MR. GROSS: Just quickly, your Honor, on the prejudice
19 point, again, I just point out the burden point, Mr, Mangi
10:52 20 again asserting that it's our burden to show prejudice. That's
21 just wrong under First Circuit precedent.

22 THE COURT: All right, so it's their burden, and they
23 say that they took depositions, and you said that, you know,
24 you couldn't come up with any --

25 MR. GROSS: But we didn't have to say anything. We

1 don't have to show anything at all, and that's the key point.

2 THE COURT: No, but they had a deposition that said
3 that you couldn't point out any emails that were on point, so
4 is that enough for them to show no prejudice?

5 MR. GROSS: It is not, your Honor, because of course
6 there's a practical --

7 THE COURT: Well, what would you say would be an
8 example of what they could do, other than say they asked about
9 the emails, and they -- they're right about the law that just
10:52 10 running up the damages isn't enough. So what else? Loss of
11 memory I can take judicial notice of, you have people lose --
12 but there's nothing specific in the record.

13 MR. GROSS: There is something specific, your Honor.
14 There's a whole category of internal Pegasystems communications
15 that were lost during this relevant time frame. If your Honor
16 looks at the *Bynher* (Phon) case, which Appian selectively
17 quotes in their brief, the First Circuit case, there the Court
18 points out that specific documents or categories of documents
19 that were lost through no fault due to the passage of time.
10:53 20 And here --

21 THE COURT: Well, is there evidence in the record that
22 these were Sinur documents?

23 MR. GROSS: These were internal Pega communications
24 during the relevant time frame, your Honor. We can't tie them
25 to the specific papers. We don't know what they said because

1 they're lost. And that's really the entire point: When you
2 sit on your hands, things happen that impact the evidentiary
3 record, and we shouldn't be penalized for that. And, again,
4 it's their burden to show that in the first place. We didn't
5 have to say anything.

6 THE COURT: All right, thank you.

7 MR. GROSS: Thank you, your Honor.

8 THE COURT: All right, go ahead.

9 MS. ROBINSON: Thank you for the opportunity, your
10:53 10 Honor. I appreciate it. So I'm discussing Dr. Keri Pearlson.
11 She's one of the sources that Pega relies on to try to
12 manufacture injury.

13 So the two relevant opinions that Dr. Pearlson offers
14 about injury, she opines that the BPM.com report likely
15 impacted the purchasing decisions of customers, but she doesn't
16 point to any actual evidence of such impact. And I think we've
17 discussed earlier that there really isn't evidence of such
18 impact in the record. And she also opines that the BPM.com
19 report caused Pega reputational harm.

10:54 20 THE COURT: My concern a little bit was, those were
21 both common-sense conclusions. I mean, it's just, like, sure.
22 I mean, I don't know why you say it's beyond the range of her
23 expertise where she's the -- is she the one who's the
24 consultant or the professor? But, whatever, I mean, it's
25 common sense.

1 MS. ROBINSON: There are two things on that, your
2 Honor. One, you know, to the extent that it's common sense,
3 then it's something that's not the proper subject of expert
4 testimony. If anyone could figure out that a report that says,
5 you know, unkind things about a competitor is something that
6 could potentially harm that competitor's reputation, you know,
7 that isn't something that is helpful to a fact-finder from an
8 expert. And, actually, Dr. Pearlson doesn't really have any
9 expertise that would make her uniquely qualified to opine on
10:55 10 that subject. She's a cyber-security expert. That's what's
11 set forth essentially in her report. That's what she disclosed
12 at her deposition when we asked her about her expertise. She
13 admitted that cyber-security expert is what's listed on her
14 expert bio online.

15 Now, in Pega's opposition, Pega tries to construct her
16 background and experience into something that it really isn't.
17 They say that she has decades of experience --

18 THE COURT: I'm unlikely to say she's unqualified, but
19 what I'm trying to get at is, you're saying, because it's
10:55 20 common sense that of course an advertisement that's false will
21 hurt someone's reputation, that an expert can't say it? Is
22 that the gist of it?

23 MS. ROBINSON: So her opinion is that the report
24 actually caused reputational damage, and she doesn't have
25 evidence to support --

1 THE COURT: Or likely caused it.

2 MS. ROBINSON: No. She says it actually caused. She
3 said it likely caused an impact on purchasing decisions.

4 THE COURT: Sure.

5 MS. ROBINSON: But she says that Pega actually was
6 damaged in terms of its reputation by the report, and she
7 doesn't have a basis to opine that there was actual
8 reputational damage. And she doesn't have experience in the
9 industry to establish that this kind of report would
10:56 10 definitively cause reputational damage either.

11 Now, to the extent her opinion is just, the report
12 could have caused damage because a report that compares a
13 competitor negatively could cause damage, that's just common
14 sense, like you said earlier. It's not the proper subject of
15 expert testimony.

16 And just to get back to her experience, we didn't move
17 specifically on her qualifications. We --

18 THE COURT: Well, she's qualified.

19 MS. ROBINSON: Well, I disagree. She is a
10:56 20 cyber-security expert. She doesn't have any background in this
21 specific industry. And though Pegasystems writes in their
22 opposition that her background includes decades of experience
23 in software procurement and implementation, that's actually not
24 in the record. And you can look at the citations they cite,
25 they use in their opposition to see that. For example, when

1 they cite that specific language I just discussed, her decades
2 of experience, the citation is to a quote from Dr. Pearlson
3 from the deposition that just says, "I am qualified to render
4 an opinion on impact, and I did render an opinion on impact."
5 That's conclusory. That's obviously not sufficient to explain
6 what in her experience showed, that she was qualified to render
7 these opinions and reach these conclusions. And I think that's
8 all I have.

9 MR. HORVATH: Thank you, your Honor. I think I can
10:57 10 still get this done before 11:00.

11 THE COURT: You will.

12 (Laughter.)

13 THE COURT: We're on Zoom for some sentencing. By the
14 way, you can stay here and clean up because we're going to be
15 doing the sentencing on Zoom, actually, because the person is
16 in custody in state prison, so we're going to just go upstairs.

17 MR. HORVATH: So, your Honor, quickly on
18 Dr. Pearlson's qualifications, I think it's abundantly clear
19 from her resume` that although cyber-security is her current
10:57 20 gig at MIT Sloan, she has for decades taught, studied, and
21 written on a totally different topic, the topic of how large
22 business organizations purchase, adopt, and implement complex
23 business software. And BPM's software, in its previous
24 iterations, has been a part of that that she has directly
25 engaged with in her teaching, her consulting, and her

1 publications for many decades. She has been engaging with BPM
2 Software since before it was called BPM Software; she'll be
3 engaged with it after it's called BPM Software. The term is
4 already becoming a bit unfashionable. Our clients are tending
5 to refer to it more as "enterprise applications" and so forth
6 now.

7 She even worked with the guy who claimed the term, the
8 concept of business process management software. So that's all
9 over her resume`. She's a well-established expert.

10:58 10 THE COURT: I'm not worried about qualifications.

11 MR. HORVATH: Because some incorrect statements have
12 been made about her qualifications, I couldn't leave them
13 unaddressed.

14 As far as her opinion, your Honor, her opinion is
15 indeed based on her extensive knowledge of how businesses
16 receive, adopt, understand and implement marketing materials;
17 that, yes, a study purporting to be a quantitative, empirical
18 study of a survey of customers is going to have an impact on
19 those customers. And she analyzed the record extensively.

10:59 20 It's not that there was no evidence. There are 54 footnotes,
21 many of them citing multiple sources from the record in the
22 mere 13 pages out of her report that are challenged by Appian
23 here.

24 So she applied these years of her expertise and
25 qualifications to a very thorough review of the record

1 evidence, looking at what Pega said, what Appian said about its
2 own marketing materials, what third parties said about them,
3 what independent analysts said about them, to come to the
4 conclusion that, yes, this was intended to and did have an
5 impact on how customers viewed the landscape, whether they
6 would invite Pega to the table for deals, and in general
7 colored their understanding of the costs and quality and
8 reputation of Pegasystems; and, as I think we've established,
9 she is qualified to make a determination at a general level.

11:00 10 THE COURT: Qualified is different than whether she
11 used a reliable methodology. I mean, it's sort of people say
12 you're not just supposed to just do a gut check because you've
13 been in the industry for a while. I mean, were there studies
14 she relied on to show that these one-on-ones make a difference?

15 MR. HORVATH: She did quote academic papers discussing
16 these kinds of marketing materials in some of the footnotes in
17 her expert report. We cite those in our brief, your Honor.
18 But I think, in a case like this where it's not a scientific
19 study that the expert is reporting on, as we said in our brief,
11:00 20 the operative legal standard is, is this the type of analysis
21 the expert would conduct if this question came up in their
22 professional life as a consultant, as an academic, and so
23 forth?

24 THE COURT: She doesn't do much for you, though,
25 right? She just says it could affect your reputation.

1 MR. HORVATH: Right, this is only a --

2 THE COURT: As I said, I even think that's a
3 reasonable inference a juror could draw.

4 MR. HORVATH: Well, your Honor, the majority of her
5 report deals with the methodology of the BPM.com report and
6 the --

7 THE COURT: Yes, I understand she serves another
8 purpose.

9 MR. HORVATH: Yes, so this is, yes, just a minority of
10 her report, but, yes, she does add to that the idea that it
11 mattered. Basically it's --

12 THE COURT: Your other expert does this for you,
13 right?

14 MR. HORVATH: Excuse me?

15 THE COURT: Your own expert does this for you, right,
16 the other one?

17 MR. HORVATH: Both of them reviewed the record.
18 Ms. Kirk Fair reviewed the record also to determine in the
19 aggregate sense -- you know, her main analysis was an
11:01 20 aggregate --

21 THE COURT: Damages expert, right?

22 MR. HORVATH: Right, right, she's a damages expert,
23 but she wears two hats really. She is very qualified at the
24 kind of econometric analysis that she did to compute the number
25 of damages. And she could have just done that just assuming

1 that there was causation. She didn't have to do the causation
2 analysis, but she happens also to be a substantive expert in
3 consumer behavior and in the process of adopting high-tech
4 kinds of innovations in organizations. So she was qualified
5 and able to also review the record and come to a conclusion.
6 She didn't really just say "zero to a hundred." That's a
7 snippet of her testimony. She didn't testify or write in her
8 report that it's equally probable that the value from zero to a
9 hundred percent of the increase is caused by the paper.

11:02 10 THE COURT: I thought she did. I mean, I was looking
11 at it. I mean, I thought she basically said, "I can't
12 allocate."

13 MR. HORVATH: She went on to opine, although she
14 didn't put a number on it, that it was a substantial amount.

15 THE COURT: Yes.

16 MR. HORVATH: Well, I mean, in false advertising
17 cases, that's how it goes. If you imagine a Lanham Act case
18 about advertising --

19 THE COURT: I don't know. I mean, I don't know, I
11:02 20 haven't done enough of them, but usually I have at least one
21 lost client where it's clear.

22 MR. HORVATH: Neither side has been able to do that in
23 this case, your Honor. Even Appian's expert in the end
24 wouldn't testify to even a single customer that they switched
25 their business as a result of the Pegasystems marketing

1 materials. It's just very challenging in a false advertising
2 case --

3 THE COURT: I understand, and that's I guess why
4 people have this presumption, but it's still, if you're asking
5 for disgorgement, it's hard to ask either a judge or a jury to
6 just speculate. It's hard.

7 Anyway, can I see lead counsel at sidebar. I don't
8 think I can handle all of you, but --

9 I will be taking this under advisement, yes.

11:03 10 (Sidebar conference off the record.)

11 (Adjourned, 11:10 a.m.)

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I, Lee A. Marzilli, Official Federal Court Reporter,
do hereby certify that the foregoing transcript, Pages 1
through 89 inclusive, was recorded by me stenographically at
the time and place aforesaid in Civil Action No. 19-11461-PBS,
Pegasystems Inc. v. Appian Corporation, et al, and thereafter
by me reduced to typewriting and is a true and accurate record
of the proceedings.

Dated this 21st day of July, 2022.

/s/ Lee A. Marzilli

LEE A. MARZILLI, CRR
OFFICIAL COURT REPORTER